TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924.

No. [redacted]

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, &c., ET AL., APPELLANTS,

vs.

A. B. CALDWELL, W. F. MIKESELL, V. E. MORGAN, ET AL., &c.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED [redacted], 1924.

(28,592)

SUPREME COURT OF THE UNITED STATES.

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1–7 In the District Court of the United States for the District of Idaho, Southern Division.

In Equity.

No. 494.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated with Them, Complainants,

vs.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, a Corporation; Salmon River Canal Company, Limited, a Corporation; John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson, and Fred L. Huston, constituting the State Board of Land Commissioners of the State of Idaho; Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, Defendants.

Amended Bill of Complaint.

To the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Southern Division:

The complainants above named file this, their Amended Bill of Complaint herein, and for their cause of action respectfully show to your Honor:

I.

That the complainants A. E. Caldwell, W. F. Mikesell, V.
8 E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, were at the time of the commencement of this action, and still are, residents and citizens of the State of Idaho.

II.

That the defendant Twin Falls Salmon River Land & Water Company, was at all the times in this complaint mentioned and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Delaware and a citizen of said State, and as such corporation engaged in the building, construction and maintenance of a certain irrigation system and the sale of water rights therein for the reclamation of lands in the County of Twin Falls, State of Idaho, including the lands of the complainants hereinafter described.

III.

That the defendant, Salmon River Canal Company, Limited, was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Idaho and is a citizen of said State and is the corporation designated and provided for in the contract between the State of Idaho and the defendant Twin Falls Salmon River Land & Water Company, and intended by such contract to operate the irrigation works to be constructed by the defendant, the Twin Falls Salmon River Land & Water Company.

9 IV.

That the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, are respectively the legally elected, qualified and acting Governor, Secretary of State, Superintendent of Public Instruction, Attorney General and Auditor of the State of Idaho, and they are and ever since on or about the first day of January, A. D. 1913, have been and do constitute the State Board of Land Commissioners of the State of Idaho, and each and every one of the defendants in this paragraph of the Bill of Complaint named were, at the time of the commencement of this action, and still are residents and citizens of the State of Idaho.

V.

That the defendant Commonwealth Trust Company of Pittsburgh, was at the time of the commencement of this action, and still is, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State.

VI.

That the defendant A. C. Robinson, was at the time of the commencement of this action and still is a resident and citizen of the State of Pennsylvania.

VII.

That on or about the 30th day of April, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through the State Board of Land Commissioners of said
10 State, under and by virtue of the terms of an Act of Congress approved August 18th, 1894, "An Act making appropriation for sundry civil expenses for the year ending June 20th, 1895, and for other purposes," commonly known as the "Carey Act," and the Statutes and Laws of the State of Idaho accepting and giving force and effect thereto, under and by virtue of the terms and conditions of said contract, the said defendant Twin Falls Salmon River Land &

Water Company agreed to construct a certain irrigation system in the State of Idaho, consisting of a large storage reservoir in Twin Falls County, in said State, conserving and storing the waters of Salmon River in said State; and for the purpose of diverting and applying said waters so stored and conserved to a beneficial use, the said defendant Twin Falls Salmon River Land & Water Company agreed to construct numerous canals, laterals, head gates, weirs, aqueducts and other irrigation appliances for the purpose of conveying and distributing the said water to and over a large tract of land of the public domain within Twin Falls County, Idaho, including the lands hereinafter described, all of which said lands were segregated and set apart by the State of Idaho under the provisions of the said Carey Act, and the said irrigation system was to be constructed for the purpose of making water available to irrigate, reclaim and cultivate the lands hereinabove referred to, and in consideration of the premises, it was agreed by the said contract above referred to that the defendant Twin Falls Salmon River Land
11 & Water Company, should have the exclusive sale of shares or water rights in said canal for said land, and the State of Idaho agreed not to permit any person to enter upon or become the owner of any such land unless he was the holder of one share or water right for every acre entered; and it was understood and agreed that after the completion of said irrigation works, the said defendant Twin Falls Salmon River Land & Water Company should convey said reservoir and canal system to a corporation to be organized under the laws of the State of Idaho to be known and called the "Salmon River Canal Company, Limited," but that all of the stock in said corporation was to be held, voted and controlled by the said defendant Twin Falls Salmon River Land & Water Company until the holder of a share or water right in said system should pay at least thirty-five per cent of the purchase price of such share or water right; that a copy of the said contract so made and entered into between the State of Idaho and the said defendant Twin Falls Salmon River Land & Water Company, is hereto attached marked Exhibit "A" and made a part of this complaint, and shall hereinafter be referred to as the "State Contract."

VIII.

That it was understood and agreed by and between the defendant Twin Falls Salmon River Land & Water Company and the State of Idaho, acting through the State Board of Land Commissioners of said State, in and by the agreement and contract commonly
12 called herein the State Contract, that the Twin Falls Salmon River Land & Water Company in no case should have the right to sell water rights or shares in said irrigation system hereinbefore referred to or in the Salmon River Canal Company, Limited, a corporation, to be formed as provided for in said State Contract, in excess of the appropriation of water for the irrigation and reclamation under said Carey Act; that the said segregation is commonly known as the "Salmon River Segregation" and the plat of the land

embraced in said segregation is hereto attached, marked Exhibit "B" and made a part of this complaint.

IX.

That on or about the 1st day of June, A. D. 1908, the complainants, A. E. Caldwell, by himself or his predecessor in interest, made entry with the said State Board of Land Commissioners for the following described tract of land situated and being in Twin Falls County, Idaho, to-wit: The South Half (S. ½) of the Southwest Quarter (S. W. ¼) of Section Three (3); Northeast Quarter (N. E. ¼) of the Southwest Quarter (S. W. ¼) of Section Three (3); Southeast Quarter (S. E. ¼) of the Southeast Quarter (S. E. ¼) of Section Four (4), all in Township Fourteen (14), South of Range Sixteen (16), E. B. M., and thereupon, and at said time, for a valuable consideration, purchased from the Twin Falls Salmon River Land & Water Company, one hundred and sixty (160) shares or water rights in said irrigation works, and to be represented by an equal number of shares of stock in the defendant, Salmon
13 River Canal Company, Limited, and then and there and at said time, entered into an agreement or agreements in writing with the defendant, the Twin Falls Salmon River Land & Water Company, for such purposes; that the said contract is herein referred to as the "Settlers Contract" and the copy of the same is annexed hereto, marked Exhibit "C" and made a part of this complaint.

X.

That the other complainants herein, and various other settlers upon said tract hereinbefore referred to, at various and divers times between on or about the 30th day of April, A. D. 1908, and on or about the 30th day of June, A. D. 1908, made entries either by themselves or their predecessors in interest similar to the entry made by the complainant A. E. Caldwell, for various tracts of land under said Salmon River Segregation, all lying in Twin Falls County, Idaho; such entries being fully described on complainants' Exhibit "B" herein, and the list of names of entrymen and their predecessors in interest and number of shares or water rights held by such entrymen attached to said Exhibit "B," to all of which reference is hereby made for the date of entry and description of the various tracts so entered and number of shares or water rights held by such entrymen, and that at said times above stated the complainants other than the complainant A. E. Caldwell, or their predecessors in interest and all of the settlers upon said tract, made and entered into con-
14 tracts similar to the one entered into by the complainant A. E. Caldwell, or his predecessor in interest, and similar in form and substance to the contract called Settlers Contract herein, marked complainants' Exhibit "C," and at said time and times purchased from the defendant Twin Falls Salmon River Land & Water Company, shares or water rights in said irrigation works and to be

represented by an equal number of shares of the stock in the defendant Salmon River Canal Company, Limited, and for the number of such shares of each of said complainants other than the complainant A. E. Caldwell, and all settlers upon said tract, these complainants refer to their Exhibit "B" which fully sets out the number of shares or water rights so purchased by such complainants or predecessors in interest and the other settlers from the defendant Twin Falls Salmon River Land & Water Company under the terms and conditions hereinabove stated.

XI.

That on or about the first day of June, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, sold to divers persons who at that time held entries of an equal number of acres of land of said Salmon River Segregation about Seventy-five Thousand (75,000) shares or water rights in the irrigation works hereinbefore referred to for the irrigation of about Seventy-five Thousand (75,000) acres of land on said segregation and issued to such persons contracts similar in form and in substance to the contract herein referred to as the Settlers Contract, and attached hereto and
15 marked Exhibit "C." and that practically all of such contracts are now outstanding and in full force and effect, and that the complainants herein and all settlers on said Salmon Tract whose names appear upon complainants' Exhibit "B" hereto attached, are now holders of such settlers contracts, either as original entrymen and contractors, or by direct or mesne conveyance, and each and all of these complainants and other settlers whose names appear upon complainants' Exhibit "B" hereto attached, hold rights in the said irrigation system hereinbefore referred to as provided for and contemplated by said contracts.

XII.

That it was understood and agreed and contemplated by the terms of said State Contract, hereinbefore referred to, that each share or water right sold by the defendant Twin Falls Salmon River Land & Water Company, should represent a carrying capacity in said canal sufficient to deliver water at the rate of one one-hundredth of one cubic foot of water per acre per second of time for each share or water right sold and should also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal, and that in no case should water rights or shares be dedicated to any lands in said segregation or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor, and under and by the terms and conditions of the Settlers
16 Contract herein described, the defendant Twin Falls Salmon River Land and Water Company covenanted and agreed that the owner of a share or water right in said irrigation system hereinbefore mentioned, shall be entitled to receive one one-hun-

dredth of a cubic foot of water per acre per second of time for the lands described in said contract.

XIII.

That the appropriation provided for by said State Contract for the irrigation works and system hereinbefore referred to, consists of the normal flow of water of the Salmon River, together with the drainage thereof and none other; that the normal flow of water of said Salmon River during the irrigation season is very small and that said irrigation works is dependent entirely upon the amount of flood water stored, saved and conserved by the said Salmon River dam; that the said dam loses a great deal of water by seepage and evaporation, the exact amount of such loss these complainants do not know, but that the amount of water so lost is and will continue to be very great; that a great deal of water is lost in transportation from the said dam to the various farm units, the exact amount of which these complainants do not know, but the same is and will continue to be very great; that the amount of the available supply of water for use on the several land entries hereinbefore referred to, after deducting the loss which does and will continue to occur on account of the matters aforesaid is inadequate to irrigate the acreage entered upon under water con-
17 tracts sold and will not exceed fifty thousand (50,000) acre feet, and these complainants allege that at no time can it be reasonably or safely determined that more than fifty thousand (50,000) acre feet will be available for the uses of water right holders in said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

XIV.

That the land of the complainants herein and all of the settlers on said Salmon Tract and included within the said segregation, is dry and arid in character and requires the artificial use of water thereon before crops of any kind or character can be raised, and that in order for the settlers on said tract to comply with the provisions of the said Carey Act and to irrigate and reclaim said land or to raise ordinary agricultural crops thereon, at least one-half miner's inch per acre continuous flow throughout the entire irrigation season, or at least two and three-fourths acre feet of water per acre, if delivered by periods of rotation as the needs of crops demand, is, and will continue to be necessary; said amount of water to be delivered within one-half mile of the respective land entries herein, and that such amount of water above stated, is, and will continue to be necessary even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops, and will not enable
the complainants and settlers upon said tract to comply with
18 the said Carey Act regarding a permanent water supply to reclaim said land, or to enable them to farm or cultivate their

said land profitably, and that unless the complainants and all settlers upon said Salmon Tract are able to secure the said amount of water for their land a great deal of such land will remain idle and unproductive, and the owner and holders thereof will suffer great and irreparable injury and damage.

XV.

That it was provided for and contemplated by the said State Contract, and the said Settlers Contracts, that an ample supply of water was and would be provided and actually furnished through the said irrigation works, to be delivered one-half mile from each quarter section of land in said segregation and sufficient in amount, time and manner of delivery to irrigate each acre of land upon which entries were made, for which shares or water rights were purchased as aforesaid in the usual, customary and ordinary manner among irrigation farmers, and to enable the owners and holders of said land to raise the ordinary, usual and profitable crops thereon, and to reclaim, cultivate and irrigate the same, and sufficient in amount, time and manner of delivery to thoroughly and properly irrigate, reclaim and cultivate each acre of said land, so as to comply with the said Carey Act and the Desert Land Laws of the United States and the Laws of the State of Idaho, and it was also provided for and contemplated by the said State Contract and the Settlers Contracts,
19 that the water right purchased by the complainants and other settlers on said tract per share or acre, was, and would be a right to receive one one-hundredth of a cubit foot of water per acre per second of time, equal to one-half miners' inch, for each acre of land irrigated, by a continous flow during the entire irrigation season from April 1st to November 1st of each year, or an equal and proportionate amount if delivered by rotation or by periods of time and in no case less than necessary to thoroughly irrigate and reclaim it as required by law and to enable the owner or holder of such land to raise ordinary and usual agricultural crops in the usual, ordinary and customary manner among farmers and irrigators, using good and reasonable husbandry; that one-half miner's inch per acre continuous flow is equal to about four and sixteen one-hundredths (4.16) acre feet per acre.

XVI.

That at and prior to the time of the making of the Settlers Contracts herein, it was represented to complainants and other purchasers of water rights or shares in said irrigation system by the defendant Twin Falls Salmon River Land & Water Company, that ample water was available to supply the rights of these complainants and all of the settlers on the said system, and that the complainants and a large number of settlers on said tract, relying upon such representations, made as aforesaid, and believing them to be true, cleared their lands or a large portion thereof, of sage and other brush, and

have planted such land with grasses, trees and other crops, all
20 of which are now growing upon said land, and needing artificial use of water, and without which, such crops will be injured and destroyed; that the complainants herein and a large number of settlers upon said tract, actually reside upon their respective land entries with their families and have so resided thereon for a long period of time, and are engaged and have been engaged in the cultivation of their respective lands, and there is now under cultivation in said segregation approximately thirty thousand (30,000) acres of land, all of which will demand and require the use of water during each irrigation season.

XVII.

That the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused and still fails, neglects and refuses to comply with the terms and conditions of the State Contract herein set out, in that, it has failed, neglected and refused and still fails, neglects and refuses to so construct its irrigation system as to make water available, ample and sufficient in quantity to furnish these complainants and other settlers upon said tract with the amount of water contracted to be furnished, and the said defendant Twin Falls Salmon River Land & Water Company, in violation of its contract with the State of Idaho, herein referred to as the State Contract, sold large number of water contracts or shares in said irrigation system, by the terms of which it undertook to furnish to such water contract holders a great amount of water far in excess of
the appropriation of water made by the defendant, or assigned
21 to it and especially referred to in the said State Contract, and these complainants allege and aver that the said Twin Falls Salmon River Land & Water Company has sold and delivered large amount of water from its reservoir system to persons and corporations other than actual settlers and contract holders upon said segregation, though having an insufficient supply, and the defendant Twin Falls Salmon River Land & Water Company has sold, and delivered and still sells and delivers from the irrigation system and reservoir herein referred to, large amount of water to persons and corporations other than settlers upon said Salmon Tract, all of which is contrary to the terms and conditions, and expressly in violation of said contract.

XVIII.

That the said defendant Twin Falls Salmon River Land & Water Company has failed, neglected and refused to comply with the terms and conditions of the said State Contract and the Settlers Contract herein referred to, in that it has failed, neglected and refused to supply ample and sufficient supply of water to these complainants and other settlers upon said tract, and has failed, neglected and refused to supply any amount of water in excess of about three-fourths acre feet per acre, and complainants aver that approximately three-fourths acre feet of water per acre is the only amount now available

for the use of all land in said segregation, and that the defendant Twin Falls Salmon River Land & Water Company, represents
22 and alleges that no other or further supply of water can be obtained from any source.

XIX.

That heretofore, and before the commencement of this action, these complainants and various other settlers upon said tract have made repeated demands upon the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, composing the State Board of Land Commissioners of the State of Idaho, to take such steps as necessary to compel the defendant Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of the said State Contract and to secure additional supply of water for said irrigation works, if possible, and if not possible, to reduce the acreage and contracts so that the total number of acres of land in said segregation should not exceed the amount of water available from said irrigation works; such water to be furnished and delivered under the terms of said State Contract and Settlers Contracts as aforesaid, but that the said State Board of Land Commissioners have failed and refused to take any steps or institute any action to bring about the results above stated, and the complainants and other settlers upon said tract have, prior to the commencement of this action, demanded that the said State Board of Land Commissioners take such action as is necessary under the laws of the State of Idaho to have the State Contract herein referred to forfeited as provided by law, or that steps be taken in court
23 to protect the interests of the complainants and other settlers upon said tract, but that such State Board of Land Commissioners have failed and refused and still fail and refuse to comply with such terms, or to take any steps whatever.

XX.

That patent for the land in said segregation has not issued from said United States to the State of Idaho, or to the settlers upon said tract, and the Department of the Interior is now withholding its decision for the issuance of such patents pending proof that the said land has been reclaimed within the contemplation of the provisions of the Carey Act, and has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of insufficiency of water.

XXI.

That unless there is additional water made available and supplied to the land in said segregation, so as to furnish each acre with the amount of water hereinbefore specified and necessary, or, if such amount of water can not be made available, there be canceled enough water contracts to reduce the acreage having appurtenant water

rights to a point equal to the water supply, all of the complainants and other contract holders will suffer great and irreparable injury; that if each contract holder entitled to receive water is furnished only the proportionate amount of water now available, the entire segregation will be spotted with uncultivated areas or areas not properly cultivated because of insufficient water supply.

24

XXII.

That under and by virtue of the terms and conditions of the State Contract and the Settlers Contracts, and because of the failure on the part of the defendant, Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of said State Contract and the said Settlers Contracts, the balance due from these complainants and all settlers on said tract and all water contract holders was intended to be and does constitute a trust fund for the purpose of carrying out the terms and conditions of the said State Contract and the said Settlers Contracts and the purposes of the said Carey Act, and particularly to supply entrymen and contract holders with an ample and sufficient supply of water in a substantial ditch as hereinbefore mentioned; that there is now due from these complainants and other contract holders under said project, as it now exists, a sum equal to about Thirty-seven ($37.00) Dollars per acre, or a total of about Two Million Seven Hundred and Seventy-five Thousand ($2,775,000.00) Dollars; that if said tract be cut down to Thirty Thousand (30,000) acres there is and would be due about One Million One Hundred and Ten Thousand ($1,110,000.00) Dollars.

XXIII.

That during all the times since the incorporation of the defendant Salmon River Canal Company, Limited, and since the defendant Twin Falls Salmon River Land & Water Company, has notified settlers under its system that water was available for deliv-

25 ery, the said defendant Twin Falls Salmon River Land & Water Company through the defendant Salmon River Canal Company, Limited, has collected large sums of money from water contract holders under said system, including these complainants, ostensibly for the purpose of applying the same on account of and for maintenance charges, but in reality such sums and a great portion thereof were used in payment of excessive and illegal salaries and expenses of the officers, employees and attorneys of the defendant Twin Falls Salmon River Land & Water Company and the said defendant Twin Falls Salmon River Land & Water Company through said Salmon River Canal Company, Limited, at all times hereinabove stated, collected such alleged maintenance charges from all water contract holders upon said Salmon Tract although only a portion of the water contracted to be delivered was in fact delivered; that said defendant Twin Falls Salmon River Land & Water Company, fraudulently applied such maintenance charges so collected as aforesaid, in paying excessive and illegal salaries of employees

and attorneys and in paying exorbitant rent for buildings and in purchase of equipments for its own use and benefit, and for the use and benefit of its kindred projects and not for the use and benefit of the said Salmon River Canal Company, Limited.

XXIV.

That the defendant, the Twin Falls Salmon River Land & Water Company, is wholly insolvent and unable to respond in dam-
26 ages to these complainants and other holders of contracts on said tract, and unless the several and total amounts due from complainants and other contract holders be treated as a trust fund to carry out the terms and conditions of said State Contract and the said Settlers' Contracts, these complainants and all contract holders under said segregation will be without adequate remedy and will suffer great and irreparable loss and injury, and the said irrigation system will be a total failure and the said segregation and no part thereof will be entitled to patent from the United States.

XXV.

Complainants further allege and aver that they do not know positively whether or not it is practicable or feasible to secure an additional supply of water for the said segregation, but these complainants have been informed and believe, and therefore allege the fact to be, that by the expenditure of a great deal less than the amount now due from the complainants and all contract holders on said tract, a sufficient supply of water can be secured to irrigate and reclaim the tract, but if sufficient supply of water can not be secured, the said irrigation project can not be made a success unless a tract of land not to exceed Thirty Thousand (30,000) acres in extent to be set apart as land subject to water rights and all other lands on the said segregations be released and declared without a water right therein.

XXVI.

That the defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, Limited, are
27 in the actual control and operation of said system of irrigation works, and have refused and still refuse to recognize any rights of priority to the available water in said irrigation works based upon actual settlement or improvement or otherwise, and threaten to deliver water to all contract holders regardless of available supply; that unless the relative rights of all entrymen are fixed by a proper order of decree of this Court, the amount of acreage under cultivation will be so great that water will not be sufficient to irrigate the same, but only a small portion thereof, and great confusion, trouble and injury will result to all persons holding water rights in said system, as well as a multiplicity of suits prosecuted by such persons so interested to secure or protect their rights therein.

XXVII.

That the defendant, Salmon River Canal Company, Limited, is in only nominal control of said system; but that the same is under the dominion of the defendant Twin Falls Salmon River Land & Water Company, and will continue to be under the control and dominion of said Twin Falls Salmon River Land & Water Company, for a number of years to come; that the defendant Twin Falls Salmon River Land & Water Company does, and will control for a number of years to come and vote nearly all of the outstanding stock of said Salmon River Canal Company, Limited, under the power contained in the State Contract hereinbefore referred to; that the said Twin Falls Salmon River Land & Water Company elected
28 and selected the present Board of Directors of said Salmon River Canal Company, Limited, and all the officers thereof, and the officers of said Salmon River Canal Company, Limited, are the agents of the defendant Twin Falls Salmon River Land & Water Company; that the interests of these complainants and all settlers on said Salmon Tract and owners and holders of said contracts in said irrigation works are adverse to the interests of the Twin Falls Salmon River Land & Water Company, and that the said last named company has refused and still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters herein set out, and these complainants are compelled to institute this action, not only in their own behalf and for their own benefit, but in behalf of and for the benefit of all settlers and water contract holders upon said tract and for the benefit of said defendant Salmon River Canal Company, Limited; that by reason of the premises, it would be useless to demand and ask the defendant Salmon River Canal Company, Limited, to institute and prosecute this action.

XXVIII.

That the defendant Twin Falls Salmon River Land & Water Company, through the defendant Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to consumers; that the said Twin Falls Salmon River Land & Water Company and the said Salmon River Canal Company, Limited, have refused and still refuse to supply com-
29 plainants and other contract holders upon said contract the water as contemplated by said State Contract and Settlers' Contracts, fraudulently pretending that the water as heretofore supplied is ample for the acreage entered, and the said defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by said contracts and as required, but in fact delivered water to such settlers, including these complainants, in a very much less amount; that unless this Court, during the pendency of this action appoint a receiver or receivers, and take possession of said irrigation works and operate the same for the

benefit of those entitled to water therefrom, the said defendant Twin Falls Salmon River Land & Water Company will continue to oppress these complainants and the other settlers upon said tract, and such conduct can only result in a multiplicity of suits; that the said defendant Twin Falls Salmon River Land & Water Company, and the defendant Salmon River Canal Company, Limited, because it is under the control and dominion of the said defendant Twin Falls Salmon River Land & Water Company, have refused and still refuses to adopt a reasonable or proper system of delivery, or one required by the condition of the crops, and have refused and still refuses and will continue to refuse to recognize the rights of the complainants and others settlers upon said tract, or permit such water contract holders to have a voice in determining when water should be delivered, or to receive the amount of water con-
30 tracted to be delivered; that the said defendants Twin Falls Salmon River Land & Water Company and said Salmon River Canal Company, Limited, have adopted and do adopt a system of delivery by periods, but have not delivered and will not deliver an ample supply of water during such period, or on demand, or as the needs of the crops require; that the result of such methods and system of delivery as aforesaid, has been to cause hardship, annoyance and loss of crops; that to continue the same will produce great loss and damage and numerous claims for set-offs and reimbursements from the several amounts due from settlers to said trust fund and greatly affect the said trust fund and the collection thereof; that unless the said settlers upon said tract can receive water as agreed in their contracts, and as provided for in said State Contract, they, and each of them will refuse to pay towards said trust fund the amount due from them under and by virtue of the terms of their respective contracts; that the collection of said trust fund by a Receiver or Receivers can not be effectually accomplished unless all matters connected with said contracts, including the operation of said irrigation works, is taken under the control of this court through its Receiver.

XXIX.

That heretofore, and before the commencement of this action, and on or about the first day of June, A. D. 1908, and long time prior to the construction and completion of the irrigation works herein-
before referred to, and prior to the time that any water was
31 made available to contract holders upon said Salmon Tract, the defendant Twin Falls Salmon River Land & Water Company, made, executed and delivered a pretended deed of trust to the defendant American Trust & Savings Bank, Trustees, by the terms of which said deed of trust, the said defendant Twin Falls Salmon River Land & Water Company pretended and attempted to create a lien upon all dams, reservoirs, canals, ditches, laterals, head gates, flumes and the entire irrigation system of the said Twin Falls Salmon River Land & Water Company, together with all lands, rights of way, easements, privileges and franchises for same, and all appli-

ances and power connected therewith, then owned or thereafter acquired, and also all notes, contracts and mortgages then owned or which may thereafter be acquired by said Twin Falls Salmon River Land & Water Company in consideration of sale of water rights, and covenanted and agreed under and by virtue of the terms and conditions of said deed of trust to assign in writing all contracts for water rights in said irrigation system, and complainants aver that the said Twin Falls Salmon River Land & Water Company, did, prior to the commencement of this action, assign practically each and all water contracts it made with settlers to said American Trust & Savings Bank; that the said deed of trust attempted to create a lien for the sum of Four Million ($4,000,000.00) Dollars to secure bonds issued or to be issued by the defendant Twin Falls Salmon River Land & Water Company, and the said defendant the
32 American Trust & Savings Bank, thereupon, and on or about said time, accepted said trust for the uses and purposes therein set out; that the said Deed of Trust was filed for record on August 22nd, A. D. 1908, in the office of the County Recorder of Twin Falls County, Idaho, and recorded in Book 5 of Mortgages at pages 302 to 325 inclusive, and the same is now of record in the office of said County Recorder and purports to be a lien on said irrigation system of the defendant Twin Falls Salmon River Land & Water Company and upon all of the contracts of these complainants and all other settlers and contract holders upon said tract with the Twin Falls Salmon River Land & Water Company; that complainants refer to Book 5 of Mortgages of Twin Falls County, Idaho, pages 302 to 325 inclusive, for a copy of said Deed of Trust, and by such reference make said record and copy of said Deed of Trust a part of this Bill as Exhibit "D," with the same force and effect as if the same were here in full set out and attached hereto.

XXX.

That thereafter and on or about the 8th day of October, A. D. 1914, the said American Trust & Savings Bank, Trustee, duly tendered its resignation as such Trustee, and thereupon, and at said time, delivered and conveyed to the defendant, Commonwealth Trust Company of Pittsburgh, all the rights, liens and property it held under and by virtue of the Trust Deed referred to in paragraph XXIX of this Amended Bill, and on or about the 9th day of
33 October, A. D. 1914, the defendant Twin Falls Salmon River Land & Water Company, appointed the said Commonwealth Trust Company of Pittsburgh as Trustee under said trust deed to act in place and stead of the said American Trust & Savings Bank, and the said Commonwealth Trust Company of Pittsburgh duly accepted such trusteeship on the 9th day of October, A. D. 1914; that the resignation of said American Trust & Savings Bank, the original trustee under the trust deed herein referred to, was duly filed for record in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, and recorded in Book 2 of Miscellaneous Records at page 367, and these

complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully set out; that the appointment of the defendant Commonwealth Trust Company of Pittsburgh as Trustee in place and stead of said American Trust & Savings Bank, the original Trustee mentioned in said trust deed, was duly fild for record and recorded in the office of the Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at page 369, and these complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if it were here fully set out; that the acceptance of the trusteeship under said Trust Deed by the said Commonwealth Trust Company of Pittsburgh was duly filed for record and recorded in the office of the Recorder of Twin Falls County,
34 Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at pages 371 and 372, and these complainants refer to such records, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

XXXI.

That by reason of the matters and things set out in this Bill of Complaint and by reason of the fact that the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused to comply with the terms and conditions of the said State Contract hereinbefore referred to and the said Settlers Contracts and by reason of the fact that the Twin Falls Salmon River Land & Water Company has failed, neglected and refused, and still fails, neglects and refuses to so complete its said irrigation system as to comply with the terms and conditions of the State Contract and Settlers Contracts, and to furnish and make available the water required by it to be furnished to the contract holders with it in accordance with the terms and conditions of said State Contract and said Settlers Contracts, the pretended lien of said deed of trust, if any, is subject and subordinate to the rights of the purchasers of shares or water rights in said irrigation system, and the grantee in said deed of trust took said deed of trust, subject to the conditions herein set out, and by reason of the premises, the pretended lien of said deed of trust is null, void and of no effect as against these
35 complainants and other water contract holders in said irrigation system.

XXXII.

That thereafter, and on or about the 14th day of October, A. D. 1914, the defendant, Twin Falls Salmon River Land & Water Company, made a pretended assignment to the defendant A. C. Robinson by the terms of which it sought to sell, transfer, assign and set over unto the defendant A. C. Robinson, contracts for the supply of water by the Twin Falls Salmon River Land & Water Com-

pany made with various persons; that such pretended assignment set forth the names of the persons with whom such contract was made, the face value of the amount due under such contracts, the number of such contracts and the number or letter of the public records of Twin Falls County wherein the said contracts were recorded; that the total amount of the unpaid balance upon such water contracts assigned as aforesaid were set out in said assignment at One Hundred Ninety-four Thousand Three Hundred Ninety-seven and 48/100 ($194,397.48) Dollars; that the said pretended assignment above referred to was filed for record and recorded in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 3 of Assignment of Water Contracts at page 1, and these complainants refer to said records above mentioned and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

36

XXXIII.

That the pretended assignments referred to in the preceding paragraph of this Bill were made wholly without any valuable consideration, and these complainants are informed and believe and allege the fact to be that the defendant A. C. Robinson threatens to collect the amounts due from the water contract holders described in said assignment, and the said A. C. Robinson will collect said amounts or the greater part thereof unless restrained from doing so by an order or decree of this Court.

XXXIV.

That the questions sought to be determined in this action are of common and general interest to all settlers upon said Salmon Tract and all water contract holders similarly situated with the complainants herein, and they constitute a class so numerous as to make it impracticable to bring them all before this court, and by reason thereof, these complainants bring this action in their own behalf and on behalf of all other settlers and water contract holders upon said tract similarly situated with them.

XXXV.

That by reason of the premises and the matters and things set out in this bill of complaint, these complainants and all other settlers upon said Salmon Tract have not a plain, speedy or adequate remedy at law, and unless this Court grant them the relief herein sought, they and each of them will suffer great and irreparable wrong and injury and will be wholly remediless.

37 Wherefore, complainants pray the judgment of this Honorable Court:

a. That it be adjudged and decreed that the amount due from each and every complainant and from each and every settler and contract holder of water rights in said irrigation system herein referred to entitled to receive water under the order of this Court, constitute a trust fund for the purpose of carrying out the objects and purposes of the said State Contract and the Settlers Contracts set out in this complaint, and particularly to furnish each and every acre of land having water rights appurtenant to it from said irrigation works with an ample and sufficient supply of water as contemplated by said State Contract and said Settlers Contracts and not less than one-half miner's inch per acre continuous flow or two and three-fourths acre feet per acre if delivered by periods upon demand of the several owners thereof, measured and delivered not more than one-half mile from each quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons whatsoever; that the pretended lien created or attempted to be created by the defendant Twin Falls Salmon River Land & Water Company under and by virtue of the deed of trust made by it to the American Trust & Savings Bank, Trustee, and now claimed by the substituted Trustee, the defendant Commonwealth Trust Company of Pittsburgh, and described herein as complainants' Exhibit "D" be canceled and declared to be void and of no effect and held
38 for naught and declared to be subject and subordinate to the rights of the complainants and other water contract holders in said irrigation system as in this complaint set out, and the said defendant Commonwealth Trust Company of Pittsburgh, Trustee, or any holder of bonds issued by the defendant Twin Falls Salmon River Land & Water Company, be restrained and enjoined from collecting any sum or sums of money due from contract holders on the said irrigation system upon such contracts either as principal or interest, and that the defendant A. C. Robinson be restrained and enjoined from collecting any monies upon the water contracts assigned to him by the defendant Twin Falls Salmon River Land & Water Company as hereinbefore set out, and that such pretended assignment of such water contracts be declared to be void and of no effect and set aside.

b. That a Receiver be appinted according to the law and the usage of this Court, and that such Receiver be authorized, directed and empowered to take immediate possession of the irrigation system in this complaint referred to and to receive and collect all sums due from all water contract holders in said irrigation system entitled to receive water therefrom under the order of this court, including interest, and to hold, use and dispose of the same as directed by this Court for the purposes in this complaint set out, and that each and all of the complainants and all water contract holders in said irrigation system who are to receive water therefrom

under the order of this Court be authorized and directed to pay any and all sums due on said contracts to said Receiver, and
39 that the said defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, and each of them, and their and each of their agents, officers, attorneys, servants, employees and assigns, be restrained and enjoined from collecting or attempting to collect any such sums of money so due from any settlers or water contract holders in said irrigation system, or their assigns.

c. That the said Receiver be empowered and directed to secure additional supply of water for such segregation, if the same be found feasible; or, in lieu thereof, this Court direct the manner and method of reducing the said segregation to a point within the water supply, so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these complainants as stated in this complaint, and that the water rights and water contracts for all land beyond and outside of said area so established as aforesaid, be annulled, canceled and held for naught, and the defendant Salmon River Canal Company, Limited, be authorized and directed to cancel the corporate stock therefor, and be restrained and enjoined from recognizing such land as entitled to water, or from delivering or furnishing water to or for said lands.

d. That it be adjudged, decreed and determined that in the event spch segregation be reduced as aforesaid, the owner or holder of the land and appurtenant water right, be entitled to receive from the said trust fund under the direction of this Court, any and
40 all sums of money paid on account of the purchase of said water right, with legal interest thereon, together with all other legal damage to be determined by this Court, resulting to such owner or holder by reason of the cancellation of his said water right.

e. That this Court decree, determine and fix all priorities existing, if any, by reason of settlement and improvement, and that pending a final determination of this action, the defendants Salmon River Canal Company, Limited, and Twin Falls Salmon River Land & Water Company, be enjoined and restrained from delivering or furnishing any water to any land not actually in cultivation at the time of the filing of this complaint.

f. That the said Receiver be authorized and directed to take immediate possession and control of said irrigation system described in this complaint and to deliver and furnish water as covenanted to be furnished on the terms and conditions of the Settlers Contract and State Contract herein to the lands entitled thereto, and that the said Receiver take possession of all monies due or collected for maintenance for the year 1914, and for the subsequent years if the Receiver be in charge of said irrigation system, or until further order of this Court, and use and expend the same in the operation

and repair of said irrigation system, and that the defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, their servants, agents, officers and employees be directed to turn over the money col-
41 lected by them, if any, for maintenance charges during the year 1914 to said Receiver.

g. That the said Receiver be authorized and directed to maintain the expenses incurred by these complainants in this action, and to pay the costs, attorneys' fees, witness fees and other proper items of expense as may be directed by this Court.

h. That the said Receiver be authorized and directed to issue Receiver's certificates from time to time as may be ordered by this Court for the purpose of said Receivership.

i. That the defendant Twin Falls Salmon River Land & Water Company be compelled to account to this Court for any and all sums converted and used by it from the maintenance charges collected by the defendant Salmon River Canal Company, Limited, and misappropriated by said Twin Falls Salmon River Land & Water Company as in this Bill set out.

j. That these complainants and all water contract holders in said irrigation system hereinbefore described, have such other or further relief in the premises as may be just and equitable, together with the costs and disbursements of this action.

Answer under oath waived.

C. O. LONGLEY,
W. E. GOLDEN,
Solicitors for Complainants,
Residing in Twin Falls, Idaho.

Duly verified.

Endorsed: Filed Nov. 9th, 1914. A. L. Richardson, Clerk, by E. B. Yarington, Deputy.

42 PLAINTIFF'S EXHIBIT "A."

Filed with Amended Complaint.

(Title of Court and Cause.)

Agreement Between the State of Idaho and Twin Falls Salmon River Land and Water Company.

This Agreement, Made and entered into in duplicate this 30th day of April, 1908, by and between the State of Idaho, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank R. Gooding, Governor, Robert Landson, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of

said State, and the Twin Falls Salmon River Land and Water Company, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho (having complied with the laws thereof relative to foreign corporations), the party of the second part, Witnesseth; That

Whereas, the party of the second part has succeeded to all the rights of C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister for the irrigation of lands in Twin Falls County, State of Idaho, which rights are evidenced by the Proposal and Request heretofore made by them on the 12th day of August, 1907, which Proposal and Request were approved by the State Board of Land Commissioners of the State of Idaho on the 12th day of August, 1907.

and

43 Whereas, all of the property rights and franchises of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister acquired under and by virtue of the said accepted proposal and request have by the consent of the State Board of Land Commissioners been duly transferred to the party of the second part herein.

It is mutually agreed and covenanted as follows:

Purpose of the Contract.

I. That for and in consideration of the covenants of the said party of the first part herein contained, the party of the second part agrees to construct and build those certain irrigation works mentioned and described in the aforesaid Proposal and Request dated on the 12th day of August, 1907, and hereinafter more particularly described and to sell shares or water rights in said canal and irrigation system from time to time as hereinafter provided to the person or persons filing upon the lands hereinafter described and also to the owners of other lands not described herein but which are susceptible of irrigation from this canal system or from any extension or enlargement thereof; said shares or water rights to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of shares or water rights as hereinafter provided.

44 General Specifications for Construction.

Reservoir.

II. The reservoir is to be formed by a masonry dam two hundred and ten feet in height, five hundred and fifty feet long on top, founded upon a solid rock foundation and extending from wall to wall of the lava Canyon on Salmon River in Section 18, Township 14 South of Range 15 East, Boise Meridian, in Twin Falls County, State of Idaho.

The reservoir formed by the dam will have a surface area of over three thousand acres, an available capacity of 180,000 acre feet and

will extend southward from the dam a distance of approximately twelve miles.

Dam.

The dam will be constructed of rock solidly imbedded in concrete. Its top width to be fifteen feet, its bottom width (210 feet below the crest) will be one hundred and nineteen feet; it will be built upon an arch of two hundred and twenty-five feet radius and with a height and length as above specified.

Tunnels.

The water will be diverted from the reservoir through a tunnel ten feet by ten feet in Section equipped with suitable metal gates in concrete settings.

The first tunnel will be approximately 2,500 feet long followed by an open cut approximately 800 feet long which cut will be followed by a second tunnel of the same length and cross section as the first. The tunnels are to be concrete lined where necessary and to be built upon a grade of one in one thousand.

Canal.

Beyond the end of the second tunnel described above the water shall be conveyed in open channels to the land to be reclaimed, using in part artificial channels and in part natural channels of suitable section grade and character of material. Both natural and artificial channels shall have a capacity of one-hundredth of one second feet of water for each acre of land served by them.

The main canal above the first point of distribution shall have a capacity of one thousand second feet, which is likewise the capacity of the tunnel section.

The grades and cross sections of the canal may vary to suit the local conditions and natural channels or coulees shall be utilized when suitable.

In earth sections, the main canal shall have a bottom width of thirty-two feet, a water depth of eight feet, the sides shall have slopes of three to one and the grade of the canal shall be one in five thousand.

Outlets from the main canal shall be built of concrete or other equally durable material with gates of wood or steel.

The canal system is to be surveyed and laterals are to be hereafter located, all entries of land being made subject to such location.

Changes in these plans and specifications may be made by second party with the consent of the State Engineer and the State Board of Land Commissioners.

Detailed plans will be hereafter filed with the State Engineer and with the State Land Board and when so approved, shall become final.

Right of Way.

III. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho or that may be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act or by any other laws (and particularly the lands hereinafter described), for the construction and operation of said canals, reservoirs and distributing system therefrom and for the necessary waste ditches which right of way shall be equal to the actual width of the canal, lateral or waste ditch, at its base from toe to toe of the embankment together with a strip of land along one side of such canal, lateral or waste ditch adjacent thereto not to exceed fifty feet in width along the main canal, thirty (30) feet in width along the laterals branching from said main canal and a proper width along the smaller laterals and waste ditches; said right of way to be located and designated by the Chief Engineer of the party of the second part and approved by the State Engineer and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch in proportion as the necessity therefor exists and all water users on lands irrigated from said canal or laterals shall have such right of way as may be necessary from
47 second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use and such right of way across said land as may be necessary for waste ditches.

No more laterals, service or waste ditches shall be constructed across any premises than are necessary in the opinion of the Chief Engineer of the Company and the State Engineer. The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the Company and subject to the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises, he shall have the right to appeal to the State Engineer whose decision shall be final.

Detailed maps showing the location of canal, laterals, reservoir and waste ditches shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement. No compensation shall be paid to land owners for the right of way herein provided for.

Apropriation of Water.

IV. The party of the second part is the owner of that certain water right evidenced by permit No. 2659 for 1,500 cubic feet per second of the waters of Salmon River in Twin Falls County, State of Idaho, issued by the State Engineer of the State of Idaho, to be used for the irrigation of the lands described in Exhibit "A"
48 herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a

reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated.

And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated.

Entry of Lands.

V. Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated the said party of the first part will, after notice given in conformity with law, throw open the hereinafter described lands or a specified portion thereof for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

Application for Lands.

VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the
49 person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares of water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the stock of the Salmon River Canal Company, Limited, as hereinafter provided and the said second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

VII. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon
50 the same for the sum of Fifty cents ($.50) per acre, half of which sum shall be paid at the time of application for the

entry of such lands made to said Board and the remaining one-half at the time of the making of final proof thereon.

Price of Water Rights.

VIII. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owners of any other lands not described herein but which are or may be susceptible of irrigation from its canal system by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal; said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board, which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore
51 mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for the lands hereinafter described or for lands which are susceptible of irrigation from said system as follows:

To the person or persons filing upon any of said lands at a price not exceeding Forty Dollars ($40) per share to be paid for as follows: One-fifth (1/5) in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of six per cent. (6%) per annum payable annually. To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal at a price not to exceed Thirty Dollars ($30) per share provided said water rights are purchased within one year after the purchase of the lands from the State and not exceeding Forty Dollars ($40) per share at any time thereafter; said payments upon said State lands to be made one-seventh (1/7) at the time of purchase and the remainder in six (6) equal annual installments with interest thereon at the rate of six per cent. (6%) per annum payable annually. In case the purchaser or entryman on desert lands, homestead lands or any lands other than those segregated under the Carey Act declines to purchase water rights within one year after the Carey Act lands are thrown open for settlement, the sum of two dollars and forty cents ($2.40) may be added to the price of water rights for each year's delay or fraction thereof. No charge shall be made for water rights for lands taken by the right of way for any railroad filing its
52 plat with the State Board of Land Commissioners prior to June 1, 1908, and all entries of land shall be made subject to such right of way.

This agreement shall not be construed to prevent the sale of shares or water rights on terms more favorable than those herein provided or to prevent the payment of installments on the purchase price in advance of maturity of the same at the option of the purchaser but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

IX. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein; for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collecting toll charges and assessments for the carrying on and maintenance of said canal and the operation and management thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement a corporation to be known as the Salmon River Canal Company, Limited, shall be formed at the expense of the party of the second part, the articles of incorporation of said Company to be in substantially the form which is filed herewith and
53 made a part hereof; that the authorized capital stock of said corporation shall be one hundred and fifty thousand shares (150,000) which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same; said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to the purchasers of land under this irrigation system. At the time of the purchase of any water right or as soon thereafter as convenient there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon; that the said party of the second part therein shall in case of said water rights or shares of stock are not fully paid for require the endorsement and delivery to it of said stock and shall at the same time require of said purchaser an agreement that until thirty-five per cent. of the purchase price of said stock has been paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation and the said Salmon River Canal Company shall have the management, ownership and control, as above set out, of the said canal system as fast as
54 the same is completed and turned over by it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and

the State Engineer that certain portions of the said canal are completed for the purpose of operation, the same may, with the consent of the State Land Board be turned over to the Salmon River Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of the contract, nor shall such consent on the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of such canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

Water Rights Dedicated.

X. The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV. and VIII. of this contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

While the party of the second part shall retain control of
55 the said Salmon River Canal Company, Limited, water shall be measured to users from the place of division at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited.

The sale of the water rights to the purchasers shall be a dedication of the waters to the lands to which the same is to be applied. Water shall only be delivered through said system during the irrigation season, to-wit, between April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

Management of Water and Charges for Delivery.

XI. The party of the second part agrees to construct the said canal system so that the water conducted through the same may be avail-

able at a point not to exceed one-half mile measured in a direct
56 line from each quarter section of land herein described and to be irrigated and reclaimed by water conducted through said canals; that it will construct and place in position all head-gates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals it being intended that the settler shall under the directions of the Chief Engineer of the second party build and furnish one gate or measuring device for his own use but that all other gates, weirs and measuring devices in the main canals, main or subordinate laterals shall be furnished and constructed by the second party.

Plans for measuring devices, head-gates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water prior to the first day of January, 1911. For each succeeding year thereafter while the second party retains the control of the said Salmon River Canal Company, Limited, said company may charge and assess the purchasers of water rights in said irrigation system the sum of thirty-five cents ($.35) per acre for each acre of land for which a water right has been purchased; said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient prior to January 1st, 1913, for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, the said second party will furnish the additional funds necessary to supply such deficiency. After said date, the actual cost of maintenance is to be paid by the settler.

57 A main lateral, within the meaning of this contract, is a lateral taken from the main line of this canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral shall also be included within these terms.

Completion of System.

XII. Said party of the second part agrees to begin work on said irrigation system within six months from the date of this contract and to complete 1-5 of the construction work within two years from this date; that the construction work shall be prosecuted diligently and continuously to completion and that a cessation of work under this contract for a period of six months after the second year without the sanction of the State Board of Land Commissioners will forfeit to the State all rights under this contract.

Second party agrees to have said canal system constructed in accordance with this contract within five years from the date hereof; it being understood, however, that detailed plans and specifications of said work have not yet been completed and that such detailed plans and specifications are to be approved by the State Engineer and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Forfeiture.

XIII. It is agreed that the rights of second party herein
58 may be forfeited in accordance with the laws of the State of Idaho relative to that subject which are now in force and effect.

Estimated Cost.

XIV. The esti-ated cost of the proposed irrigation works is $2,-500,000 and upwards and the price at which water rights are fixed herein and for which liens are hereby authorized and created against the separate legal sub-divisions of land herein described are deemed necessary in order to pay the cost and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

Description of Lands.

XV. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho, under and pursuant to the Act of Congress approved August 18th, 1894, and the Amendments relating thereto, commonly called the Carey Act, and also other lands hereinafter described, the irrigation and reclamation of which lands this contract is designated to effect. The lands to be reclaimed under said "Carey Act" are fully set forth in the list herewith marked Exhibit "A" which is hereby referred to and made a part hereof.

Highways.

XVI. Entries of land are understood to be made subject to a right of way without compensation to the entrymen, for roads upon all exterior section lines, and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

59 Water Supply for Cities and Towns.

XVII. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or rental as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established or the inhabitants therein. Said cities and towns or the inhabitants thereof must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them and shares of stock of the Salmon River Canal Company, Limited, shall be issued for the amounts of water repre-

sented by said use to the inhabitants thereof or to the trustees of any village or the mayor of any city in trust for the use and benefit of the towns and cities and inhabitants thereof.

Delivery of Water to Users.

XVIII. It is agreed that the said Salmon River Canal Company, Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights, or who are not holders of stock in said Salmon River Canal Company, Limited, or who are not otherwise entitled thereto under this contract.

60 Mortgage.

XIX. The right, title and interest of the second party in the irrigation works and system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

XX. This contract may be altered and amended by the first party with the consent of the second party for the purpose of carrying out the object of the contract and for the purpose of meeting any conditions now unforeseen.

Detailed plans and specifications shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval.

With the consent of the State Land Board, the irrigation system hereby contracted for may be enlarged second party so as to cover lands not under the irrigation system, as at present designed, such extensions, however, be a part of this system.

Coulees and Draws.

XXI. Coulees and draws may be used as waterways when convenient, but all coulees and draws utilized as laterals from which water is to be taken by settlers for irrigation shall be so constructed and improved as to practically conform to artificially constructed laterals of like capacity so that water may be available for use from the same, in practically the same manner and at approximately the same expense, and it is further agreed that the specifica-
61–73 tions as to the construction and improvements of said coulees and draws shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval, it being understood that this paragraph is to be liberally construed in order that no unnecessary improvement of coulees need be made.

With the consent of the State Land Board, changes may be made in the number, location and capacity of the reservoirs.

Whereas, All the requirements of the law have been, in so far as this contract is concerned, fully met and in every respect complied with; the execution of this contract is therefore ordered.

In witness whereof, The said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners, caused this agreement to be signed in duplicate by its governor, who is ex-officio president of said State Board of Land Commissioners, and attested by the registrar of said Board.

And, the said party of the second part has hereunto caused its corporate name to be subscribed by its proper officer and to be duly attested, as provided by resolution of this Board of Directors.

* * * * * * *

74 (Title of Court and Cause.)

In Equity.

No. 494.

Amended Answer of Twin Falls Salmon River Land & Water Company to Amended Bill of Complaint; also Cross-bill.

Comes now the defendant herein, the Twin Falls Salmon River Land and Water Company, a corporation, answering the amended bill of complaint herein and says:

1.

Admits the allegations contained in paragraph one of the amended bill herein.

2.

Admits the allegations contained in paragraph two of the amended bill herein.

3.

Admits the allegations contained in paragraph three of the amended bill herein.

4.

Admits the allegations contained in paragraph four of the amended bill herein.

75 5.

Admits the allegations contained in paragraph five of the amended bill herein.

6.

Admits the allegations contained in paragraph six of the amended bill herein.

7.

Admits that the Twin Falls Salmon River Land and Water Company made and entered into a contract with the State of Idaho, a copy of which contract is attached to and filed with the amended bill herein and marked Exhibit "A," and made a part thereof and which is referred to in the said amended bill as the State Contract, and contracted as therein specified and not otherwise.

8.

That it was understood and agreed by and between the Twin Falls Salmon River Land and Water Company and the State of Idaho, in and by said agreement, that said defendant should have the right to sell water rights or shares in the said irrigation system as provided and set forth in said contract, Exhibit "A," and not otherwise.

9.

Defendant admits that on or about the first day of June, 1908, the complainant, A. E. Caldwell, by himself or his predecessor in interest, made entry of the lands described in paragraph nine of the amended bill herein and purchased or contracted to purchase one hundred sixty (160) shares of stock in the Salmon River
76 Canal Company, Limited, representing the water right for said lands and that said Caldwell at said time entered into an agreement in writing for said purpose, said agreement or contract being commonly known as the Settler's Contract and being in the form Exhibit "C" attached to the amended bill herein.

10.

Defendant admits that the complainants herein, and various other settlers mentioned in the amended bill herein, on the first day of June, 1908, and at various times thereafter, made entries similar to the entry of the complainant Caldwell for various tracts of land within the limits of the irrigation project designated in Exhibits "A" and "B" referred to in the amended bill and that the said settlers or entrymen of lands under said irrigation project described in said Exhibit "A" made and entered into contracts similar in form to the contract Exhibit "C," commonly known as the Settler's Contract. That defendant does not know whether the list Exhibit "B" is correct or not, and therefore denies that said list is a correct list.

11.

Defendant admits that on or about the first day of June, 1908, and prior to the filing of the bill herein, that the defendant, the Twin Falls Salmon River Land and Water Company, entered into contracts with divers persons who made entry of lands under the said irrigation project described in said Exhibit "A" and commonly re-

ferred to as the Salmon River Segregation in the form Ex-
77 hibit "C" and covering approximately 73,000, but not 75,000 acres of land, and that the rights of the said parties holding said contracts are in accordance with said contracts and with the said contract, Exhibit "A," and not otherwise, and that said parties have no rights except such as are conferred by the said contracts, Exhibits "A" and "C."

That entrymen on approximately fifteen thousand (15,000) acres of land within said area of 73,000 acres, who had contracted and agreed in the form of the contract Exhibit "C" to purchase shares representing water rights in the said irrigation system to the extent of approximately fifteen thousand (15,000) shares have, as defendant is informed and believes, failed and neglected to settle upon, cultivate or improve their lands as required by law and for that reason the entries of land on said segregation have become void and of no force and effect and are subject to cancellation at any time and that for this reason there are not now outstanding valid settlers' contracts, as defendant is informed and believes, for more than sixty thousand (60,000) shares or water rights in the said irrigation works representing approximately 60,000 acres of land in said segregation.

12.

That it was understood, agreed and contemplated by the terms of the said State Contract, Exhibit "A," and said settler's contract, Exhibit "C," hereinbefore referred to as is stated, set forth and agreed in said contracts and not otherwise.

78 13.

Defendant avers that the appropriation provided for by the State Contract for the irrigation works and system referred to in the amended bill herein consists of the flow of Salmon River together with its tributaries and rainage thereof above the point of diversion and none other; that the normal flow of the stream fluctuates to a great extent and that therefore, under the terms of the Contract, Exhibit "A," it was provided that water should be stored for irrigation purposes. Defendant denies that the dam or reservoir, or either of them, lose a great deal of water by seepage or evaporation, or any amount in excess of the normal and customary amounts under such circumstances, and defendant denies the amount of water so lost is or will continue to be very great. Defendant denies that a great deal of water is lost in transportation from the dam or reservoir to the various farm units, or that any water is lost in transportation from the dam or reservoir to the various farm units in excess of the customary or usual amount under such circumstances, and denies that the same is or will continue to be very great. Defendant denies that the amount of the available supply of water for use on the several land entries referred to in the amended bill after deducting the loss mentioned in paragraph thirteen of the amended bill herein is or will be inadequate to irrigate the acreage entered upon

and under water contracts sold, and denies that the said available supply of water for use on the several land entries will not
79 exceed 50,000 acre feet or that it cannot be determined that more than 50,000 acre feet of water will be available for the use of the water right holders under said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

14.

Defendant denies that in order to comply with the provisions of the Carey Act, or to irrigate or reclaim the lands mentioned in the amended bill herein or to reclaim said land or to raise ordinary agriculture crops thereon, that at least one-half miner's inch per acre continuous flow of water throughout the entire irrigation season, or at least two and three-fourths (2¾) acre feet of water per acre, if delivered by periods of rotation as the needs of the crops demand (said amount of water to be delivered within one-half mile of the respective land entries), is or will continue to be necessary, and defendant denies that a less amount or any less amount will be wholly or at all insufficient to raise ordinary agricultural crops, or that a less amount will not enable the complainants and settlers upon said tract to comply with the Carey Act regarding a permanent water supply to reclaim said land or enable them to farm or cultivate their land profitably and defendant denies that unless the complianants and all settlers upon said Salmon Tract are able to secure the amount of water claimed in paragraph fourteen of the amended bill for their land that a great deal or any of such land will remain idle or
80 unproductive or that the owners or holders thereof will suffer great or irreparable injury or damage or any injury or damage whatever.

15.

Defendant avers that it was provided for and contemplated by the said State Contract, Exhibit "A," and the said Settler's contract, Exhibit "C," that water should be furnished and delivered in accordance with the terms of said contracts and not otherwise, or that it should be delivered at any place other than that specified in the said contract, or that it should be delivered in any amount, time or manner except in accordance with an efficient administration of the water supply and a skillful use thereof by the farmer, or in any manner other than to enable the farmer to raise the crops suitable to the existing conditions, and defendant denies that it was provided or contemplated by the said State Contract and the Settler's Contract that the water right purchased by the complainants and other settlers on said tract per share or acre was or would be a right to receive one one-hundredth of a cubic foot of water per acre per second of time equal to one-half miner's inch for each acre of land irrigated by a continuous flow during an entire irrigation season extending from April 1st to November 1st of each year, or an equal or

proportionate amount if delivered by rotation or by periods of time and defendant denies that the irrigation season extends from the first day of April to the first day of November of each year but alleges that the irrigation season fluctuates from year to year,
81 and defendant avers that the State Contract, Exhibit "A," was made and entered into after an investigation and examination by the State Engineer of the State of Idaho of the water supply available for the irrigation of the lands described in Exhibit "A"; that the State Engineer of the State of Idaho made report to the State Board of Land Commissioners of said State in pursuance of law that the water supply was sufficient for the irrigation of the said lands described in said Exhibit "A" and which were thrown open for entry and that after said report by the said State Engineer, the State Board of Land Commissioners of the State of Idaho made and entered into said Contract, Exhibit "A."

16.

Defendant denies that at or prior to the time of the making of the settler's contract herein, it was represented to complainants or to other purchasers of water rights or shares in said irrigation system by this defendant that ample water was available to supply the rights of these complainants and all of the settlers on said system or that any representations whatever were made other than as appear in said contracts Exhibits "A" and "C," and denies that the complainants or a large number of settlers on said tract relied upon any representations, made by this defendant and that relying upon such representations cleared their lands or a large portion thereof and have planted such land with crops which are now growing upon said land.

82 17.

Defendant denies that it has failed or neglected or refused or that it still fails or neglects or refuses to comply with the terms or conditions of the State Contract hereinbefore referred to in any respect whatever either as set up in paragraph seventeen of the amended bill herein or otherwise, and denies that it has or that it still fails, neglects or refuses to so construct its irrigation system as to make water available in ample or sufficient quantities to furnish complainants or other settlers upon said tract with the water necessary for the reclamation of their lands as provided in said contracts and defendant denies that in violation of its contract or otherwise with the State of Idaho, herein referred to as the State Contract, that it sold a large or any number of water contracts or shares in the said irrigation system described in said Exhibit "A," by the terms of which it undertook to furnish to such water-contract holders a great or any amount of water in excess of the appropriation of water made by the defendant or assigned to it and referred to in said State Contract, and defendant denies that it has sold or delivered a large or any amount of water from its reservair system to persons or corporations other than actual settlers or contract holders upon said segregation

and denies that it has sold or delivered, or that it still sells or delivers from the irrigation and reservoir system mentioned in the amended bill herein a large or any amount of water to persons or corporations other than settlers upon said Salmon River Tract mentioned in the amended bill herein.

83 Defendant further avers that as it is advised and believes, the Salmon River Canal Company, Limited, loaned a certain amount of water not to exceed 1,000 acre feet to persons who obtained an order or request therefor from stockholders of said company during a short time in the season of 1914, which water was later to be returned, but that this defendant has no intention or purpose of selling or disposing of any waters other than to persons holding contracts in the form Exhibit "C."

18.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract, Exhibit "C," herein referred to in any respect or at all, or that it has failed or neglected or refused to supply an ample or sufficient supply of water to the complainants or either or any of them, or to any of the other settlers upon said tract, or to either or any of them, or that it has failed or neglected or refused to supply an amount of water in excess of about three-fourths of an acre foot per acre, and defendant denies that approximately three-fourths of an acre foot of water per acre is the only amount now or heretofore available for the use of all of the land under said segregation. Defendant further avers that the only source of water supply for the said tract is the said Salmon River and its tributaries above the point of diversion of the dam described in said Exhibit "A."

84 19.

That defendant has no knowledge, information or belief concerning the matters set up in paragraph nineteen of the amended bill herein and therefore denies each and every of the allegations therein contained, and defendant further denies that the said State Board of Land Commissioners were either justified by any facts or authorized by any law to take the action or any of the actions demanded by the complainants herein in paragraph nineteen of the amended bill herein or that the said State Board of Land Commissioners had any right or authority to bring any action in court in regard to any of the said matters in said paragraph of said amended bill and denies that the said State Board of Land Commissioners had any right, power or authority to require the defendant herein to procure the additional supply of water for the irrigation works mentioned in the complaint or to reduce the acreage of land mentioned or to cancel, or annul any of the contracts already entered into between the settlers and the defendant herein. Defendant admits that said Land Board has the power and that it is its duty to cancel entries of

land under said system in case of a failure to comply with the law as to residence or cultivation.

20.

Defendant denies that the Department of the Interior is now or at any time has withheld its decision for the issuance of the patents for lands under said irrigation works pending proof that said land had been reclaimed within the contemplation of the pro-
85 visions of the Carey Act, or that it has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of the insufficiency of the water.

21.

Defendant denies that an additional water supply is necessary to be supplied to the said segregation so as to furnish each acre with the amount of water necessary for the irrigation thereof and denies that if additional water is not furnished, or if water contracts be not canceled and the acreage of said segregation reduced, that the complainants or either or any of them, or other contract holders, or either or any of them, will suffer great or irreparable injury or any injury whatever and defendant denies that if the contract holder entitled to receive water is furnished only the proportionate amount of water now available that the entire or any portion of the segregation will be spotted with uncultivated areas, or any uncultivated areas whatever, or that there will be areas not properly cultivated because of an insufficient water supply.

22.

Defendant denies that the balance due under and by virtue of the terms and conditions of the State Contract and the Settlers' Contracts and because of any failure on the part of the defendant to comply with the terms or conditions of said State Contract, and the said Settlers' Contract that the balance due from the complainants or either or any of them, or from the settlers on the tract, or
86 either or any of them, was intended to be or should be or does constitute a trust fund for the purpose of carrying out the terms or conditions of the State Contract, or the Settlers' Contracts for the purpose of the Carey Act, or particularly to supply entrymen and contract holders with a supply of water in a substantial ditch as claimed in the amended bill herein. Defendant admits that there is now due from the complainants and from the contract holders under said project as it now exists a sum equal to and in excess of about thirty-seven ($37.00) dollars per acre or a total of about two million seven hundred seventy-five thousand dollars ($2,775,000.00).

23.

Defendant denies that since it has notified settlers under its system that water was available for delivery that it has through the defend-

ant, the Salmon River Canal Company, Limited, collected large sums of money from water-contract holders including the complainants, ostensibly for maintenance charges but that in reality such sums and a great portion thereof, were used in the payment of excessive and illegal salaries and expenses of the officers, employees or attorneys of this defendant and denies that this defendant through the Salmon River Canal Company, Limited, at the times or in the manner stated in paragraph twenty-three of the amended bill herein collected such maintenance charges from all water-contract holders upon said segregation although only a portion of the water contracted to be delivered was in fact delivered; denies that this
87 defendant fraudulently or otherwise applied such maintenance charges so collected as stated in the amended bill herein in paying either excessive or illegal salaries of employees or attorneys, or paying exorbitant rent for buildings or in the purchase of equipment for its own use or benefit or for the use or benefit of its kindred projects or any of them and not for the use and benefit of said Salmon River Canal Company, Limited, and defendant further avers that all maintenance charges and assessments, as it is informed and believes, that had been made by the Salmon River Canal Company, Limited, have been charged only against such persons as were legally liable therefor and only in proper amounts, and that only proper payments were made out of said fund.

24.

Defendant denies that the Twin Falls Salmon River Land and Water Company is insolvent or unable to respond in damages to the complainants or other holders of contracts on said tract and denies that unless the several or total amounts due from complainants or other contract holders be treated as a trust fund to carry out the terms and conditions of the said State Contract and the Settlers' Contract, that the complainants or any of them or all contract holders, or any of them under said segregation, will be without adequate remedy, or will suffer great or irreparable loss or injury, or that said irrigation system will be a failure or that said segregation and no part thereof will be entitled to patent from the United States.

88 25.

Defendant avers that no additional supply of water is necessary to irrigate the lands now entered upon said segregation or for which water contracts have been issued and deny that said irrigation project cannot be made a success unless a tract of land not to exceed 30,000 acres in extent be set apart as land subject to water rights and that all other lands on said segregation be released and declared to be without a water right thereon.

26.

Defendant avers that the rights of the settlers and water-contract holders under said irrigation project are for a proportionate interest

in the said water rights and irrigation works described in Exhibit "A," and that all contract holders are entitled to a proportionate part of the water supply and a proportionate part in the irrigation works and the rights appurtenant thereto, and defendant denies that unless the relative rights of the entrymen are fixed by an order or decree of the court that the amount of the acreage under cultivation will be so great that water will not be sufficient to irrigate the same but only a small portion thereof and denies that great confusion, trouble or injury will result to all or any persons holding water rights in said system, or that a multiplicity of suits prosecuted by such persons so interested will follow. Defendant further avers that under the terms of the Contract, Exhibit "A," that the said irrigation system, as fast as the same was completed for
89 operation, was to be turned over to the Salmon River Canal Company, Limited. That the same was completed for operation; that the certificate of the Chief Engineer of the Salmon River Canal Company, Limited, was made as provided by Exhibit "A" and that the same was presented to the State Engineer of the State of Idaho, who approved the same, and transmitted the same to the State Board of Land Commissioners, but that no order has ever been made by the State Board of Land Commissioners of the State of Idaho turning over the said system or any portion thereof for operation to the Salmon River Canal Company, Limited, although said Salmon River Canal Company, Limited, was properly entitled to have said system turned over for such purpose; that in actual practice, said Salmon River Canal Company, Limited, has taken possession and control of the said system and operated the same.

27.

Defendant avers that the Salmon River Canal Company, Limited, is in control of said irrigation system in the manner and under the conditions above set forth but denies that the same is under the dominion of the defendant, the Twin Falls Salmon River Land & Water Company, or that the Twin Falls Salmon River Land & Water Company has any power or authority over said Salmon River Canal Company, Limited, except as may arise from the conditions of the contracts Exhibits "A" and "C"; that the length of time that the Twin Falls Salmon River Land & Water Company will
90 continue to vote the stock in the Salmon River Canal Company, Limited, of the various plaintiffs and other settlers upon said irrigation project depends entirely upon the promptness with which the payments are made upon the water contract known as the Settlers' Contracts, Exhibit "C"; that the votes electing the present Board of Directors of the Salmon River Canal Company, Limited, were cast chiefly by the Twin Falls Salmon River Land and Water Company under the authority given in the contracts Exhibits "A" and "C," and defendant denies that all of the officers of the Salmon River Canal Company, Limited, are the agents of this defendant, and defendant denies that the interests of all of the settlers on the Salmon River Tract, or the owners or holders of

contracts in said irrigation works are adverse except in this case to the interest of this defendant and defendant denies that it has refused or that it still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters set forth in the amended bill herein, or that it has in any manner been requested to take any steps whatever in this matter and further denies that the Salmon River Canal Company, Limited, has in any manner been requested to take any action with regard to any of the matters set forth in the bill herein or to bring any suit thereon, and defendant denies that the complainants are compelled to institute this action not only in their own behalf but in the behalf of and for the benefit of all settlers and water-contract holders on said tract, or for the benefit of the Salmon River Canal Com-
91 pany, Limited, and defendant denies that it would be useless to demand or ask the defendant, the Salmon River Canal Company, Limited, to institute or prosecute this action.

28.

Defendant avers that the Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to the consumers and that the Twin Falls Salmon River Land and Water Company does not control such distribution and defendant denies that it or the Salmon River Canal Company, Limited, have refused or still refuses to supply complainants or any of them, or other contract-holders or any of them upon said tract the water as contemplated or constructed or provided in the State Contract, and the Settler's Contract Exhibits "A" and "C," or that this defendant or the said Salmon River Canal Company, Limited, have fraudulently pretended that the water heretofore supplied is ample for the acreage entered and defendant denies that it or the Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by the said contracts Exhibit "A" and "C" as required thereby and denies that in fact this defendant or the said Salmon River Canal Company, Limited, delivered water to such settlers or any settlers, including the complainants, or any of them, in a very much less amount; denies that unless this court during the pendency of this action appoints a receiver or receivers, or takes possession of said irrigation works or operates the same for the benefit of those entitled to water therefrom, that this defendant will
92 continue to oppress these complainants or any of them, or the settlers on said tract or any of them, and denies that any acts of this defendant will result in the multiplicity of suits; denies that this defendant or the Salmon River Canal Company, Limited, have refused or still refuse to adopt a reasonable or proper system of delivery of water, or one required by the conditions of the crops or that they or either of them have refused or still refuse or that they will continue to refuse to recognize the rights of the complainants and other settlers upon said tract, or either or any of them, but allege that the said water will be furnished and delivered according to the best methods of practice and in pursuance of the contracts Exhibit- "A"

and "C" and defendant denies that it or the Salmon River Canal Company, Limited, have not delivered or will not deliver an ample supply of water during any period of delivery or as the needs of the crops require, and defendant denies that the results of its methods or system of delivery has been to cause hardship or annoyance or loss of crops, and denies that to continue its method of water delivery will produce great or any loss or damage, or numerous claims for offsets and reimbursements from the several amounts due from settlers or that it will greatly affect the funds so due or the collection thereof and defendant denies that the collection of the funds due from the settlers cannot be effectually accomplished without the aid of a receiver or without the appointment of a receiver for the operation of the irrigation works.

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29.

Defendant admits that prior to the first day of June, 1908, and prior to the time of the making of any land entries by any settler upon said Salmon Tract that it executed a deed of trust to the defendant, the American Trust & Savings Bank, Trustee, as set forth in the answer of the said trustee filed herein and defendant alleges that said trust deed did create a valid lien upon all of the property therein described and defendant admits that it assigned to the said trustee a larger portion of the water contracts made with settlers upon said tract.

30.

Defendant admits the allegations contained in paragraph thirty of the amended bill.

31.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract in the form Exhibit "C," or that it has failed, or neglected or refused, or that it still fails, neglects or refuses to complete its irrigation system in any respect or at all so as to comply with the terms and conditions of the said contracts, Exhibits "A" and "C," or to furnish or make available the water required by it to be furnished to the contract holders in accordance with the terms or conditions of the said State Contract and said Settlers' Contracts, Exhibits "A" and "C" and denies that the pretended lien of the trust deed is subject or subordinate to the rights of the

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purchasers of shares or water rights in said irrigation system but alleges the said deed of trust was taken subject to and in pursuance of the said Contract Exhibit "A" which contract authorized the making thereof and denies that said trust deed is null or void or of no effect as against the complainants, or any of them, or against the other water contract holders in said irrigation system, or any of them.

32.

Defendant admits the making of the assignment mentioned in paragraph thirty-two of the amended bill and alleges that the same is regular and valid and not pretended.

33.

Defendant denies that the said assignment referred to in the amended bill in paragraphs thirty-two and thirty-three thereof was made without a valuable consideration.

34.

Defendant denies that the questions sought to be determined in this action are of common or general interest to all settlers upon said Salmon Tract, or to all water contract holders thereon and denies that they constitute a class so numerous as to make it impracticable to bring them all before the court.

35.

Defendant denies that the complainants or any of them, or the other settlers upon said Salmon Tract, or any of them, have
95 not a plain, speedy or adequate remedy at law, or that they will suffer great or irreparable wrong or injury unless the court grants the relief prayed for.

And further answering, defendant says that the amount of water claimed as necessary in the amended bill herein for the use of the plaintiffs and others upon said tract is an amount in excess of that required for beneficial use and that the use of the amount of water as set forth as being demanded in the amended bill herein upon the lands described in said bill would be injurious to said lands and would result in the depreciation of the security afforded by the water contracts commonly called the settlers' contracts in the form Exhibit "C," and would impair the security covered by the lien granted under the statute to the Twin Falls Salmon River Land and Water Company herein.

36.

Cross-bill.

And the Twin Falls Salmon River Land and Water Company, by way of cross bill herein against the plaintiffs above mentioned and all in whose behalf they may be acting, and also by way of counterclaim and further answer, avers as follows:

That on account of the soil and physical conditions existing upon said Salmon tract and upon the lands to the north thereof which are likely to receive the drainage therefrom, that it is absolutely essential

for the best interests of the said Salmon River Tract and of
96 all of the settlers thereon, that very great care should be used in the application of water to said lands for irrigation purposes and also in regard to the amount thereof which is applied for said purpose, and if great care is not used in the irrigation of said lands, that a large area thereof will become valueless and the security afforded by the water contracts hereinbefore mentioned will become lost and that large numbers of suits will be brought by persons upon adjoining tracts for injury to lands done by reason of waste and seepage waters from the Salmon tract.

That it is necessary for the settlers upon said tract to use great skill in the application of water to their said lands and for the Salmon River Canal Company and the Twin Falls Salmon River Land and Water Company to cause only so much water as may be necessarily required for the irrigation of crops to be run into said canals described in the contract Exhibit "A."

That the application of the amount of water demanded by the plaintiffs in the amended bill herein and the manner of use desired and demanded therein would result in great damage and injury to a large portion of the lands on the said Salmon tract and in the destruction of the security afforded to the Twin Falls Salmon River Land & Water Company and its successors in interest under the terms of the water contract, Exhibit "C."

That under the terms of the contract, Exhibit "A" (Par. X of said contract), attached to the amended bill herein, it is the duty
97 of the Twin Falls Salmon River Land and Water Company, while it shall retain control of the said Salmon River Canal Company, as specified in said contract, Exhibit "A," to cause water to be measured to users from the place of diversion at the main laterals of the irrigation system in such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

That the use of a rotation system is necessary in the distribution of the water to settlers on said tract in order that the minimum amount of injury may be done to the lands irrigated from said canal system and in order that the security represented by the water contracts mentioned in the amended bill herein may not be impaired and also for the purpose of most equitably and efficiently distributing the water supply in order that effective use may be made thereof by all of the settlers upon said tract and in order that an unnecessary amount of water may not be used.

That the plaintiffs herein are members and officers of a settlers' association, being a voluntary association organized by a portion of the settlers on said project and that the said settlers' association and the plaintiffs in the amended bill herein, the officers thereof, have joined together and conspired to prevent the use of a rotation system in the use of water and to prevent the use of water on said
98 tract under proper and suitable rules and regulations in accordance with the terms of the said contract, Exhibit "A,"

and to prevent the proper and suitable distribution of the water supply under suitable rules and regulations now in use and those which will hereafter be made, and that they will continue to so join together and conspire and to bring numerous and vexatious suits in regard to said matter unless restrained by the order of this court; that the plaintiffs herein are acting for themselves and for other persons members of the said water users' association; that the joining together and conspiring and bringing of the suits above mentioned are adverse to the interests of the settlers and water users on said tract not members of the settlers' association; that it is the duty of the Twin Falls Salmon River Land and Water Company and of the Salmon River Canal Company, Limited, to handle and distribute the water supply in such manner as will best protect and serve the interests of all the users of water from the canal system and that this cannot be done unless the rules and regulations prescribed by the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company are complied with and unless a proper and suitable system of the distribution of water by rotation is maintained.

That unless said rules and regulations are reserved and said system of rotation maintained, it will be impossible to distribute the water supply to the irrigators upon said tract in such manner as will best protect and serve the interests of all of the users
99–104 of water from said canal system and the security represented by the contracts made in the form, Exhibit "C," will be greatly impaired and in part destroyed.

Wherefore, The Twin Falls Salmon River Land and Water Company prays that the amended bill of the plaintiff herein may be dismissed and that the plaintiffs herein and all members of the Settlers' Association, of which said plaintiffs are members and officers, be enjoined and restrained from bringing any suits or in any manner interfering with the delivery and distribution of the water supply through the irrigation system herein mentioned, according to the rules and regulations established therefor and in accordance with the rotation system and said Twin Falls Salmon River Land and Water Company prays that all proper relief may be granted herein.

S. H. HAYS,
Attorney for Defendant,
Residing at Boise, Idaho.

Duly verified. Endorsed: Filed March 29, 1915. A. L. Richardson, Clerk, by Pearl E. Zanger, Deputy.

105 (Title of Court and Cause.)

Answer of Commonwealth Trust Company of Pittsburgh, Trustee.

Now comes the Commonwealth Trust Company of Pittsburgh, Trustee, and saving and reserving to itself all manner of benefit or advantage of exception that can or may be had or taken to the
106 many errors, uncertainties and imperfections in the said amended bill contained, with like effect as if this defendant

had demurred thereto, for answer to said amended bill or to such parts thereof as this defendant is advised it is necessary or material for it to make answer thereto, answering says:

I.

This defendant is not advised save by the allegations of said amended bill of complaint, and is without knowledge as to the citizenship or residence of any of the parties plaintiff to said suit, and it therefore leaves the complainants to make such proof thereof as they may be advised is material or as they may be able to produce, but this defendant admits that the said Twin Falls Salmon River Land & Water Company is a corporation organized under the laws of the State of Delaware and is a citizen of said State, and that the Salmon River Canal Company, Limited, is a corporation organized under the laws of the State of Idaho and is a citizen of said State; that the said John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston are officials of the State of Idaho as alleged in paragraph IV of said amended bill of complaint and constitute the State Board of Land Commissioners of said State; that this defendant, the Commonwealth Trust Company of Pittsburgh, is a corporation organized under the laws of the State of Pennsylvania and a citizen of said State with its principal office in the City of Pittsburgh, and that the defendant A. C. Robinson is a citizen
107 and resident of said State of Pennsylvania residing in the City of Pittsburgh, said State.

II.

This defendant admits that on or about the 30th day of April, A. D. 1908, the defendant, Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through its State Board of Land Commissioners; admits that said contract was entered into under the terms of the Act of Congress commonly known as the Carey Act, approved August 18th, 1894, and certain other acts of Congress amendatory thereof or supplemental thereto, and the laws of the State of Idaho accepting the terms of said acts of Congress, made in furtherance thereof and for the purpose of carrying out the terms, provisions and conditions of said Acts of Congress; admits that said contract contemplated and provided for the construction of an irrigation system consisting of a storage reservoir in Twin Falls County, said State, for conserving and storing the waters of the Salmon River and for the purpose of diverting and carrying said water so stored and conserved to the lands to be reclaimed therefrom; and this answering defendant is not fully advised as to the terms of said contract and is without knowledge whether the contents thereof are correctly stated in paragraph VI of the amended bill of complaint herein, and it, therefore, prays that complainants be required to make strict proof of the terms and provisions of said contract of April 30th, 1908.

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III.

This defendant is without knowledge as to the facts alleged in paragraph VIII of said amended bill of complaint, and it therefore prays that the complainants be required to make strict proof of each and every allegation contained in said paragraph VIII of the said amended bill herein.

IV.

This defendant is not advised, save by the allegations of said amended bill, as to whether on or about the 1st day of June, 1908, the complainant A. E. Caldwell by himself or his predecessor in interest, made entry with the State Board of Land Commissioners for the lands described in paragraph IX of said amended bill, or as to whether said complainant or his predecessor in interest purchased water rights or entered into a contract or contracts as alleged in said paragraph IX, and this defendant, being without knowledge as to said facts, leaves the complainants to make such proof thereof as they may be advised is material and as they may be able to produce.

V.

This defendant is not advised, save by said amended bill of complaint, whether the said complainants or any of them or various other settlers on the tract of land in said amended bill referred to, made entries by themselves or their predecessors in interest for tracts of land under what is referred to as the Salmon River Segregation in said amended bill, or as to whether such entries are fully described in complainants' Exhibit "B," referred to in said amended
109 bill, and this defendant, being without knowledge as to the allegations contained in paragraph X of said amended bill, prays that complainants may be required to make strict proof of each and every of said allegations.

VI.

This answering defendant is not advised, save by said amended bill of complaint, whether the Twin Falls Salmon River Land & Water Company on or about the 1st day of June, 1908, or at any other time, sold to persons who held entries or owned land on said Salmon River Segregation, about seventy-five thousand shares or water rights in the irrigation works referred to in said amended bill, and being without knowledge as to the matters set forth in said paragraph XI in said amended bill, this answering defendant prays that complainants may be required to make strict proof of each and every allegation contained in said paragraph XI.

VII.

This defendant is not advised, save by said amended bill, as to what was understood or agreed or contemplated by the terms of the

contract referred to in said amended bill as the State Contract, and being without knowledge as to said matters and each of the allegations contained in said paragraph XII of said amended bill, this defendant prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XII; but this defendant, upon its information and belief, denies that under or by the terms or conditions of what is referred to in said
110 amended bill as the Settlers' Contracts, the owners of shares or water rights in said irrigation system are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for the irrigation of the lands described in their respective contracts, but on the contrary, this defendant alleges on its information and belief, that such water was to be delivered in turn or by rotation at such times and in such quantities as said Twin Falls Salmon River Land & Water Company or said Salmon River Canal Company, Limited, should deem necessary or proper.

VIII.

This defendant is not advised, save by said amended bill, as to the water supply of said irrigation system or as to the flow of said Salmon River, or as to any of the facts alleged or set forth in paragraph XIII of said amended bill, and being without knowledge as to the facts set forth in said paragraph XIII, it prays that complainants may be required to make strict proof of each and every of the allegations contained in said paragraph.

IX.

This defendant is not advised, save by said amended bill, as to whether the lands of complainants and others on said Salmon River tract are dry and arid in character and will not produce crops except by irrigation, and as to the amount of water that may be required per acre, and as to whether such water must be furnished in continuous flow or by periods of rotation, and as to any of the
111 other facts set forth in paragraph XIV of said amended bill, and being without knowledge as to such facts or any of them, prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XIV.

X.

This defendant is not advised, save by said amended bill, whether it was provided for or contemplated by the State contract or what is referred to in said amended bill as the Settlers' Contracts, that an ample supply of water was and would be provided and actually furnished through said irrigation works as alleged in paragraph XV of said amended bill, and being without knowledge as to said allegations and as to any of the other allegations contained in said paragraph XV except as herein otherwise expressly admitted or denied, this defendant prays that complainants be required to make

strict proof of each and every allegation contained in paragraph XV of said amended bill; but this defendant, upon its information and belief, denies that complainants or other settlers upon said tract, or any of them, are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for each water right or share purchased, either by continuous flow or during the irrigation season from April 1st to November 1st of each year, or an equal or proportionate amount if delivered by rotation or by periods of time.

XI.

This defendant is not advised, save by said amended bill,
112 as to any of the facts set forth in paragraph XVI of said amended bill, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XVI.

XII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XVII of said amended bill, and being without knowledge as to said facts or any of them, prays that complainants be required to make strict proof of each and every allegation or the facts set forth in said paragraph XVII.

XIII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth or allegations contained in paragraphs XVIII, XIX, XX and XXI of said amended bill, and being without knowledge as to the facts contained in said paragraphs, and each and every of them, this defendant prays that complainants be required to make strict proof of the allegations contained in said paragraphs XVIII, XIX, XX and XXI.

XIV.

This defendant denies that under or by virtue of the terms and conditions of what is referred to in said amended bill of complaint as the State Contract or the Settlers' Contracts, or because of the failure of the defendant Twin Falls Salmon River Land & Water Company to comply with the terms or conditions of said
113 State Contract or the Settlers' Contracts the balance due from the complainants or other settlers on said tract or the purchasers of water rights was intended to be or to constitute a trust fund for the purpose of carrying out the terms or any of the terms or conditions of either the said State Contract *of* the said Settlers' Contracts, or any of them, or the purposes of the said Act known as the Carey Act, or to supply the entrymen or contract holders with an ample or sufficient supply or any supply of water

in a substantial or other ditch; but, on the contrary, this defendant alleges that the amount due under said water contracts or settlers' contracts is due and payable to the owners or holders of said contracts. This defendant is not advised, save by said amended bill of complaint, as to the amount due under said Settlers' Contracts, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as *that* may be able to produce.

XV.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XXIII of said amended bill, and being without knowledge as to said matters, this defendant therefore leaves the complainants to make such proof of the facts contained in said paragraph XXIII as they may be advised is material or as they may be able to produce.

XVI.

This defendant is not advised, save by said amended bill,
114 as to whether said Twin Falls Salmon River Land & Water Company is insolvent or unable to respond in damages to complainants and other holders of contracts on said Salmon tract, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as they may be able to produce. But defendant denies that unless the amount due from complainants and other holders be treated as a trust fund to carry out the terms and conditions of such State Contract and the said Settlers' Contracts, complainants, or any of them, or the other contract holders or any of them on said project will be without adequate remedy or will suffer great or irreparable loss or injury, or that said irrigation system will be a total failure or that patent will not issue from the United States to the State of Idaho or the persons entitled thereto for lands embraced in said segregation.

XVII.

This defendant is not advised, save by said amended bill, as to whether it is either necessary or feasible to secure an additional supply of water for the lands embraced in said segregation, and being without knowledge as to said facts, it prays that complainants be required to make strict proof thereof; but this defendant denies that said irrigation project can not be made a success unless the irrigable area in said tract be reduced to thirty thousand acres, or to any other area less than the amount for which water rights have been sold; denies that any of the lands under said segrega-
115 gation should be released or declared without water right therein, and upon its information and belief, alleges that the Court is without authority, power or jurisdiction to cancel any of the contracts for the sale of water rights under said Salmon River

project or to reduce the acreage entitled to water from said irrigation system.

XIX.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXVI and XXVII of said amended bill relative to the control of the Salmon River Canal Company, Limited, by the said Twin Falls Salmon River Land & Water Company, or as to any of the facts set forth in said paragraphs XXVI and XXVII, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraphs XXVI and XXVII.

XX.

The defendant is not advised, save by said amended bill, as to whether either the said Twin Falls Salmon River Land & Water Company or the said Salmon River Canal Company, Limited, *have* failed or refused to supply complainants or other contract holders under said irrigation system with water as contemplated by the State Contract or the Settlers' Contracts, or *have* failed to furnish or supply persons entitled to water from said irrigation system to the amount of water to which they may be entitled as alleged in paragraph XXVIII of said amended bill, and being without
116 knowledge as to such facts, it prays that the complainants be required to make strict proof of each and every of said allegations. And defendant, on its information and belief, denies that unless a receiver is appointed for said irrigation system and for operating the same, the said Twin Falls Salmon River Land & Water Company will oppress complainants or other settlers on said tract, or that its operations or conduct or management of said irrigation system will result in a multiplicity of suits or any suits; denies that either the said Twin Falls Salmon River Land & Water Company or the Twin Falls Canal Company, Limited, has refused or will refuse to adopt a reasonable or proper system of delivery or as required by the condition of the crops, or will refuse to recognize the rights of complainants and other settlers on said tract, or any of them, or will refuse to deliver water to complainants and other contract holders on said tract, at such times and in such manner and in such quantities as they may be entitled to receive the same under their respective contracts, and upon its information and belief this defendant further denies that complainants and other settlers or persons entitled to receive water from said irrigation system have not in the past received the water to which they were entitled or as the needs of their respective crops required the same, or that the methods or system of delivering water to complainants and other settlers on said tract has caused hardship, annoyance or loss of crops, and this defendant likewise denies, upon its

information and belief, that a continuation of the system or
117 method of delivering water in the past will produce any loss or damage to the complainants or persons entitled to water from said system, or will result in numerous or other claims for off-sets or reimbursements from the amounts due from settlers under their respective contracts for the purchase of water rights; and denies that the amount due from settlers or purchasers of water rights constitutes a trust fund available for any purpose except for the payment of the bonds issued under the mortgage or trust deed under which this defendant is trustee or under other similar obligations providing for the pledge or deposit of such water contracts, or by mortgage or lien upon said irrigation system or on said water contracts, or both such irrigation system and water contracts; that as to whether the settlers upon said tract, or any of them, will refuse to pay the balance due on their water contracts unless such balance be held to constitute a trust fund for the purposes set forth in paragraph XXVIII of said amended bill, this defendant is not advised, save by said amended bill, and being without knowledge as to such matters, prays that complainants be required to make strict proof of said allegations and each of them.

XXI.

This defendant admits that some time after the 1st day of June, A. D. 1908, but as of said date, the said Twin Falls Salmon River Land & Water Company made, executed and delivered a certain
118 mortgage or deed of trust conveying to the American Trust and Savings Bank, a corporation organized under the laws of the State of Illinois, with its principal office in the City of Chicago, said State, as Trustee, the irrigation system, water rights and water appropriations described or referred to in plaintiffs' amended bill of complaint, including the reservoirs, dams, canals, ditches, laterals and other structures of every kind used in connection with or forming a part of said irrigation system, together with all rights of way, easements, privileges and franchises required for the proper operation and use of said irrigation system, and that as further and additional security for the payment of the bonds issued and to be issued under said mortgage or deed of trust there was assigned to and deposited with the said Trustee, The American Trust and Savings Bank, contracts sometimes referred to in said amended bill as Settlers' Contracts, to the aggregate amount par value, as this defendant is informed and believes, of $2,337,319.92; and that, pursuant to the terms and provisions of said mortgage or deed of trust, the said American Trust and Savings Bank, Trustee, certified and delivered the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company to the amount of $1,773,000.00, par value; that said bonds were issued upon the terms and conditions stated in said mortgage or deed of trust referred to in paragraph XXIX of said amended bill and only after there had been duly assigned to and deposited with the said Trustee water con-

tracts or settlers' contracts to the amount aforesaid; that this
119 defendant denies on its information and belief that said mortgage or deed of trust was made or executed or said bonds issued or delivered or said water contracts assigned to said Trustee before the construction of said irrigation works referred to in said amended bill, and this defendant prays leave to refer to said original mortgage or deed of trust when the same may be produced or to the record thereof referred to in said amended bill for a full and complete statement of the terms and conditions of said instrument and the terms and conditions upon which said water contracts or settlers' contracts were assigned to and deposited with said Trustee and said bonds issued, certified and delivered; and this defendant alleges that the bonds so issued, certified and delivered, as aforesaid, to the amount of $1,773,000.00, par value, were negotiated and sold by said Twin Falls Salmon River Land & Water Company to divers and sundry persons who purchased the same for value without notice or knowledge of any offset or defense on the part of the makers of said water contracts or settlers' contracts against the payment of the amount due thereunder, and said bonds are still outstanding, as this defendant is informed and believes and so alleges the fact to be, and in the hands of innocent holders for value, who purchased the same relying upon the faith and credit of said water contracts and settlers' contracts so assigned to and deposited and pledged with the said Trustee as security for the payment of said bonds, and rely-
120 ing upon the fact that the amount specified in said contracts, and each of them, as the purchase price of the water rights or shares of stock therein mentioned would be paid with interest thereon at the times and in the manner in said contracts stated, and relying upon the fact that said contracts were a first and prior lien upon the lands therein respectively described.

XXII.

This defendant admits that on or about the 8th day of October, A. D. 1914, the said American Trust and Savings Bank (now the Continental and Commercial Trust and Savings Bank), Trustee, resigned as Trustee under said mortgage or deed of trust and that this defendant thereafter and on or about the 9th day of October, A. D. 1914, succeeded to said trusteeship and is now the duly appointed, qualified and acting Trustee under said mortgage or deed of trust and holds the said water contracts or settlers' contracts under said mortgage or trust deed as security for the payment of the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company issued, sold, certified and delivered as aforesaid and held as aforesaid by innocent holders for value.

XXIII.

This defendant, according to its information and belief, denies that the said Twin Falls Salmon River Land & Water Company has failed, neglected or refused to comply with the terms or conditions,

or any of them, of the said State contract or the said settlers'
121 contracts, or any of them; denies that by reason of any alleged or pretended default of said Twin Falls Salmon River Land & Water Company, the lien of said mortgage or trust deed is either impaired or subordinated or made subject or subordinate to the rights of purchasers of shares or water rights in said irrigation system, and denies that the grantee *is* said deed of trust took said deed of trust subject to the conditions, or any of the conditions, mentioned in paragraph XXXI, or any other paragraph or part of said amended bill; denies that the lien of said mortgage or trust deed is null or void or of no effect as against the said complainants or any other water contract holders in said irrigation system, or any other person, corporation or body politic.

XXIV.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXXII and XXXIII of said amended bill relative to an alleged assignment from said Twin Falls Salmon River Land & Water Company to the defendant, A. C. Robinson, of certain water contracts, and it, therefore, leaves complainants to make such proof of the allegations contained in said paragraphs XXXII and XXXIII as they may be advised is material or as they may be able to produce.

XXV.

This defendant is not advised, save by said amended bill, as to the facts alleged in paragraphs XXXIV and XXXV of said
122 amended bill, and being without knowledge as to the facts set forth in said paragraphs, it prays that complainants may be required to make strict proof of each and every allegation contained in said paragraphs XXXIV and XXXV.

XXVI.

Further answering complainants' amended bill, this defendant says that it is informed and believes, and therefore states the fact to be, that under the terms and provisions of the said water contracts or settlers' contracts and under the said State contract referred to in the amended bill herein, and under the Act of Congress commonly known as the Carey Act and the amendments thereto and the laws of the State of Idaho passed in furtherance of said Acts of Congress in order to obtain the benefit thereof, the said complainants and other purchasers of water rights in said irrigation system are only entitled to a proportionate interest in said irrigation system, water rights and water appropriations based upon the number of shares or interests finally sold therein.

XXVII.

As to each of the allegations of said amended bill not in this answer expressly admitted or denied, this defendant prays that the complainants may be required to make strict proof thereof and of each of such allegations of said amended bill as against this defendant.

Wherefore, having fully answered complainants' amended bill of complaint filed herein, this defendant prays to be hence
123 dismissed with its costs and charges in his behalf most wrongfully sustained.

COMMONWEALTH TRUST COMPANY OF PITTSBURGH,
Trustee,
By RICHARDS & HAGA,
It Solicitors.

Endorsed: Filed December 10, 1914. A. L. Richardson, Clerk.

1 & 2 TRANSCRIPT OF RECORD.

Supreme Court of the United States, October Term, 1921.

No. —.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated With Them, and Salmon River Canal Company, a Corporation, Appellees.

Volume III.

Upon Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY, a Corporation; Salmon River Canal Company, a Corporation; Commonwealth Trust Company of Pittsburg, Trustee, and A. C. Robinson, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, in Their Own Behalf and in Behalf of All Persons Similarly Situated with Them, Appellees.

TRANSCRIPT OF THE RECORD.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

4–8 *Names and Addresses of Attorneys of Record.*

S. H. Hays,
Boise, Idaho,
Solicitor for Twin Falls Salmon River Land & Water Co.

P. B. Carter,
Boise, Idaho,
Solicitor for Salmon River Canal Co.

Richards & Haga,
Boise, Idaho,

A. W. Edwards,
St. Louis, Mo.,
Solicitors for Commonwealth Trust Co. of Pittsburgh, Trustee, and A. C. Robinson.

Appellants:

James R. Bothwell,
Twin Falls, Idaho.

Sullivan & Sullivan,
Boise, Idaho,
Solicitors for Appellees.

Turner K. Hackman,
Twin Falls, Idaho,
Solicitor for Intervenors.

9 In the United States District Court for the District of Idaho, Southern Division.

(Title of Court & Cause.)

Order.

It appearing that the taking of testimony on behalf of the defendants in this cause could not be concluded at this time, counsel for plaintiffs thereupon moved the Court for the appointment of a receiver to take possession of and operate the irrigation system
10 constructed by the defendant Twin Falls Salmon River Land & Water Company under its contract with the State of Idaho, dated April 30, 1908, and for making certain work and improvements upon that part of said irrigation system known as the Check Basin; and the Court having heard counsel for the respective parties and being fully advised in the premises,

It is hereby ordered, adjudged and decreed as follows:

1. That the application for the appointment of such receiver be denied on condition that the defendant Twin Falls Salmon River Land & Water Company on or before the 10th day of April, 1919, furnish a good and sufficient bond, to be approved by the Judge of this Court, or by counsel for the plaintiffs, in the penal sum of Twenty Thousand Dollars ($20,000.00), to A. E. Caldwell, one of the plaintiffs in this cause, on behalf of himself and all other shareholders and water users of the defendant Salmon River Canal Company, Limited, who shall pay the maintenance charges for the year 1919, hereinafter mentioned; conditioned, and that if it shall finally be determined in this action that the construction of the bank now in process of construction in said Check Basin is not a proper maintenance charge to be collected by the defendant Salmon River Canal Company, Limited, from its stockholders and water users, but that the construction of said bank should be made at the expense of the said Twin Falls Salmon River & Water Company
11 as a construction charge, the said Twin Falls Salmon River Land & Water Company shall pay into the Registry of this Court within thirty (30) days after such final determination the amount which may be so improperly collected as a maintenance charge, to-wit: Fifty cents per share or acre, for refund or return to such shareholders or water users who may have paid the same.

2. That until said bond has been furnished, as aforesaid, the defendant Salmon River Canal Company, Limited, shall set aside and hold intact and as a special fund, subject to the further order of this Court, the amount paid by the shareholders and water users on account of such improvement, to-wit: fifty cents per share.

3. That the said plaintiffs be, and they hereby are, and each of them is hereby restrained and enjoined from commencing, maintaining or prosecuting any action or proceeding in any court of the

State of Idaho to compel the said Salmon River Canal Company, Limited, to deliver water without the payment of such maintenance charge; and the said A. E. Caldwell is hereby especially enjoined and restrained from further prosecuting, until the further order of this Court, that certain action commenced by him as plaintiff on or about the 15th day of March, 1919, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Twin Falls County, against the said defendants and certain other
12 parties; Provided, that if the bond hereinbefore mentioned is not given on or before the 10th day of April, 1919, the provisions of this paragraph restraining or enjoining the said plaintiffs, or any of them, or said Caldwell from bringing, maintaining or prosecuting actions in the State Courts shall immediately upon such default in the furnishing of such bond become ineffectual and considered as annulled and dissolved, and the said Salmon River Canal Company, Limited, its officers, agents, employees and servants, shall, in the event of such default, be restrained and enjoined from collecting from its shareholders and water users the said fifty cents per share or acre without any further order in the premises.

Dated this 25th day of March, 1919.

FRANK S. DIETRICH,
District Judge.

Filed March 26, 1919.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

Bond Pursuant to Order Dated March 25 *and Filed March* 26, 1919.

Know all men by these presents: That we, Twin Falls Salmon River Land & Water Company, as Principal, and Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland as surety, are held and firmly bound
13 unto A. E. Caldwell, one of the above-named plaintiffs, on behalf of himself and all other shareholders and water users of the defendant Salmon River Canal Company, Limited, who shall pay the maintenance charges for the year 1919, specially mentioned in paragraphs 1 and 2 of a certain order, a copy of which is hereunto annexed, in the just and full sum of Twenty Thousand Dollars ($20,000.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, and our, and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 8th day of April, 1919.

The condition of this obligation is such, that whereas the above-named Twin Falls Salmon River Land & Water Company, one of the above-named defendants, desires to give a bond in the said sum of Twenty Thousand Dollars ($20,000.00) for the purpose of obtaining the benefits and advantages that will secure it by the giving of such bond under a certain order made in the above-entitled cause

on the 25th day of March, 1919, and filed with the Clerk of said Court on the 26th day of March, 1919, a copy of which said order is hereto annexed, marked Exhibit "A" and hereby referred to for a statement of the terms and provisions thereof.

Now, therefore, if the said Twin Falls Salmon River Land & Water Company shall pay into the Registry of the above-
14 entitled Court within thirty (30) days after it shall be finally determined in the above-entitled cause that the construction of the bank now in process of construction in what is known as the Check Basin of the irrigation system referred to in the annexed order, is not a proper maintenance charge to be collected by the defendant Salmon River Canal Company, Limited, from its stockholders and water users, but that the construction of said bank should be made at the expense of said Twin Falls Salmon River Land & Water Company as a construction charge, the amount which may be so improperly collected as a maintenance charge by said Salmon River Canal Company, Limited, to-wit: fifty cents per share or acre, for refund or return to such shareholders or water users who may have paid the same, then the above obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof, The said Principal and the said Surety have hereunto caused their respective names to be subscribed by their respective officers and their respective seals affixed, the day and year first above written.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY,
[SEAL.] By A. C. ROBINSON,
President.

Attest:
J. D. BUSH,
Secretary.

15 FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By SIDNEY C. FULD,
Its Attorney in Fact.

Attested and Sealed.
By WALTER S. BRUCE,
General Agent.

Approved April 8, 1919.
SULLIVAN & SULLIVAN,
JAMES R. BOTHWELL,
Attorneys for Plaintiffs.

Filed April 8, 1919.
W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

Amendment to Answer of Twin Falls Salmon River Land and Water Company.

Now comes the defendant Twin Falls Salmon River Land & Water Company, by leave of Court first had and obtained, and amends its answer herein by interlineation as follows:

By adding after paragraph 35 of said answer and above what is denominated a "Cross-Bill" the following:

36.

Further answering complainant's amended bill, this defendant says that prior to the execution of said contract (Exhibit
16 "A" to complainant's bill) between said State of Idaho and this defendant, the State of Idaho had made application to the Secretary of the Interior, as required by said Act of Congress commonly known as the Carey Act, and had filed a map of said land proposed to be irrigated exhibiting a plan showing the mode of the contemplated irrigation and showing the source of the water to be used for irrigation and reclamation, and which map and plan of irrigation had been duly approved by the Secretary of the Interior and the lands referred to in complainant's amended bill segregated from the public domain for reclamation under said Act of Congress and by the plan of irrigation and from the source of water supply described in said State contract (Exhibit "A"). That in approving said plan of irrigation and segregating said lands from the public domain the Secretary of the Interior did adjudge and determine the sufficiency of the water supply and the feasibility of said irrigation system and plan of irrigation, and the feasibility thereof and sufficiency of said water supply had likewise been determined, adjudged and approved by the said State of Idaho, and such determinations were made, as aforesaid, prior to the execution of said State contract by this defendant. And this defendant is informed and believes, and so alleges the fact to be, that the determinations so made by the Secretary of the Interior and the State
17 of Idaho are final and conclusive, and are binding upon said State and said Secretary.

37.

Further answering complainant's amended bill, this defendant says that by the terms of its said contract with the State of Idaho it was obliged to issue water contracts and contract to sell shares in said irrigation system to all perons who were by said State permitted to make entries upon said Carey Act lands and to owners of other lands susceptible of irrigation from said irrigation system; and this defendant, in good faith and believing there was sufficient water

available to irrigate said lands for which water rights or shares in said irrigation system were sold, and relying upon the determinations so made by the Secretary of the Interior and the State of Idaho approving the feasibility of said irrigation system and the sufficiency of the water supply, did execute water contracts and sell shares or interests in said irrigation system for approximately 73,000 acres of land situated under said irrigation system, all of which said water contracts were approved by the State Board of Land Commissioners of the State of Idaho before the same became effective or were delivered to the purchasers of such shares or water rights; and that in the event it be found or determined that the water supply available for said irrigation system is insufficient to reclaim all the lands for which contracts were executed by this defendant and approved by said State Board of Land Commissioners, this defendant
18 alleges that under the terms of the said Act of Congress and the laws of the State of Idaho and the said State and settlers' contracts the purchasers of such water rights or shares in said irrigation system prior to the available water supply having been exhausted acquired an undivided and proportionate interest in said irrigation system and water supply sufficient to entitle such land owners to patent to the lands entered by them respectively, but all contracts or shares issued after such available supply had been exhausted would be unauthorized and void under said Act of Congress; and this defendant alleges that by virtue of the provisions of the second clause of Article 6 and the second clause of Section 3 of Article 4 of the Constitution of the United States the said Carey Act and the amendments thereof are the supreme law of the land with respect to the reclamation of lands in said project, and prescribe the conditions upon which title to said lands shall pass from the United States and the amount of water that shall be applied to or made available for said lands before the same may be segregated from the public domain or title thereto passed from the United States, and no act may lawfully be done nor contract entered into to prevent the accomplishment of the purposes of said laws or the issuance of patent to land so segregated from the public domain under said Act after such segregation has been made, or to impair or defeat the
19 lien of this defendant on such lands. And this defendant especially sets up and claims the right under said Act of Congress and its amendments to apply the available water supply to all the land in said project which may be reclaimed from such supply, and to a lien on such lands so reclaimed for the cost of said irrigation works, and to so use and apply said available water supply to the reclamation of lands in said project as to effectually accomplish the objects and purposes of said Carey Act and the amendments thereto.

S. H. HAYS,
Solicitor for Defendant Twin Falls Salmon River Land & Water Company.

Residence: Boise, Idaho.

Filed June 30, 1919.
W. D. McREYNOLDS,
Clerk,
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause.)

Amendment to Answer of Defendant Commonwealth Trust Company of Pittsburgh and to Answer of Defendant A. C. Robinson.

Come now the defendants Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, by leave of Court first had and obtained, and amend their answers herein by interlineation as follows:

By inserting in the answer of Commonwealth Trust Company of Pittsburgh, Trustee, after paragraph 27 of said answer and after paragraph 2 of the answer of the defendant A. C. Robinson the following:

(*a*) Further answering complainant's amended bill, this defendant says that prior to the execution of said contract (Exhibit "A" to complainant's bill) between said State of Idaho and the defendant Twin Falls Salmon River Land & Water Company, the State of Idaho had made application to the Secretary of the Interior, as required by said Act of Congress commonly known as the Carey Act, and had filed a map of said land proposed to be irrigated exhibiting a plan showing the mode of the contemplated irrigation and showing the source of the water to be used for irrigation and reclamation, and which map and plan of irrigation had been duly approved by the Secretary of the Interior and the lands referred to in complainant's amended bill segregated from the public domain for reclamation under said Act of Congress and by the plan of irrigation and from the source of water supply described in said State contract (Exhibit "A"). That in approving said plan of irrigation and segregating said lands from the public domain the Secretary of the Interior did adjudge and determine the sufficiency of the water supply and the feasibility of said irrigation system and plan of irrigation, and the feasibility thereof and sufficiency of said water supply had likewise been determined, adjudged, and approved by the said State of Idaho, and such determinations were made, as aforesaid, prior to the execution of said State contract by said Twin Falls Salmon River Land & Water Company. And this defendant is informed and believes, and so alleges the fact to be, that the determinations so made by the Secretary of the Interior and the State of Idaho are final and conclusive, and are binding upon said State and said Secretary.

(*b*) Further answering complainant's amended bill, this defendant says that by the terms of said contract with the State of Idaho the said Twin Falls Salmon River Land & Water

Company was obliged to issue water contracts and contract to sell shares in said irrigation system to all persons who were by said State permitted to make entries upon said Carey Acts lands and to owners of other lands susceptible of irrigation from said irrigation system; and said Twin Falls Salmon River Land & Water Company, in good faith and believing there was sufficient water available to irrigate said lands for which water rights or shares in said irrigation system were sold, and relying upon the determinations so made by the Secretary of the Interior and the State of Idaho approving the feasibility of said irrigation system and the sufficiency of the water supply, did execute water contracts and sell shares or interests in said irrigation system for approximately 73,000 acres of land situated under said irrigation system, all of which said
22 water contracts were approved by the State Board of Land Commissioners of the State of Idaho before the same became effective or were delivered to the purchasers of such shares or water rights; and in the event it be found or determined that the water supply available for said irrigation system is insufficient to reclaim all the lands for which contracts were executed by said Twin Falls Salmon River Land & Water Company and approved by said State Board of Land Commissioners, this defendant alleges upon its information and *believe* that under the terms of said Act of Congress and the laws of the State of Idaho and the said State and settlers' contracts the purchasers of such water rights or shares in said irrigation system, prior to the available water supply having been exhausted, acquired an undivided and proportionate interest in said irrigation system and water supply sufficient to entitle such land owners to patent to the lands entered by them respectively, but all contracts or shares issued after such available supply had been exhausted would be unauthorized and void under said Act of Congress; and this defendant alleges that by virtue of the provisions of the second clause of Article 6 and the second clause of Section 3 of Article 4 of the Constitution of the United States the said Carey Act and the amendments thereof are the supreme law of the land with respect to the reclamation of lands in said project, and prescribe the conditions upon which title to said lands shall pass from the
23 United States and the amount of water that shall be applied to or made available for said lands before the same may be segregated from the public domain or title thereto passed from the United States, and no act may lawfully be done nor contract entered into to prevent the accomplishment of the purposes of said laws or the issuance of patent to land so segregated from the public domain under said Act after such segregation has been made, or to impair or defeat the lien of such water contracts on such lands. And this defendant especially sets up and claims the right under said Act of Congress and its amendments to have the available water supply applied to all lands in said project which may be reclaimed from such supply (and to a lien on such lands so reclaimed for the cost of said irrigation works in accordance with the terms of the contracts so held or deposited with this defendant as hereinbefore set forth, and to have the available water supply so used and applied to the reclama-

tion of the lands in said project as to effectually accomplish the objects and purposes of said Act and the amendments thereto, and so as to make the lien of all such water contracts as were entered into prior to the time that the available water supply was so exhausted effectual and enforceable against the lands and water rights in such contracts described.

24 RICHARDS & HAGA,
Solicitors for Defendants Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson.

Residence: Boise, Idaho.

Filed June 30, 1919.
W. D. McREYNOLDS,
Clerk,
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause.)

Supplemental Answer of Defendants.

Now come the above named defendants, by leave of Court first had and obtained, and file this their supplemental answer to the amended bill of complaint of the complainants herein, and allege:

I.

That since the commencement of the above entitled suit and since the filing of the answers filed by these defendants respectively herein, and to-wit: on the 11th day of November, 1916, the State Board of Land Commissioners of the State of Idaho did make and enter an order in the minutes of said Board cancelling a large number of entries made by entrymen under the Carey Act on lands situated under the said Salmon River Project, to-wit: approximately 187 entries and embracing an acreage of approximately 13,000
25 acres; that the cancellation of said entries was made by said Board after notice given to the entrymen as required by the laws of the State of Idaho and rules and regulations of said Board, and such entries were duly cancelled by said Board for failure of the entrymen to make final proof on their respective entries within the time required by law. That by the cancellation of said entries the number of acres entitled to water from said Salmon River Irrigation System was reduced to 60,170.8 acres.

II.

That thereafter and to-wit: on the 18th day of October, 1917, said State Board of Land Commissioners did make and enter an order with reference to the acreage to be irrigated from said Salmon River Project, which order, among other things, provided that:

"The total irrigable acres in the Salmon River Twin Falls Carey Act Project shall not exceed 35,000 irrigable acres within the project, and that the State Land Board will not apply to the Federal Government for patents to lands within the project which, added to any lands already patented, or State lands heretofore sold, or Desert Entries which may remain within the project, will make a total acreage receiving water from the irrigation system and within the project of over 35,000 acres."

That said order contemplated the reduction of said project to 35,000 net irrigable acres, or a gross acreage of approximately 39,-
000 acres, including non-irrigable land embraced within en-
26 tries approved for patent; and said order contemplated that approximately 21,000 acres out of the 60,170.8 acres then embraced within outstanding water contracts under said project should be excluded from said project and relinquished to the United States and should not be patented to the State of Idaho for irrigation from said irrigation system.

III.

That thereafter and on the 4th day of February, 1918, said State Board of Land Commissioners adopted the following resolution with reference to the exclusion of said 21,000 acres of land from said irrigation project:

"Whereas, This Board has heretofore, by and with the consent of the Commissioner of the General Land Office of the United States, determined upon the number of acres which it will request patent from the United States for and which will be included in either the Twin Falls Salmon River Carey Act Project or the Twin Falls Oakley Carey Act Project;

"And, whereas, the reduction of the said projects to the number of acres heretofore indicated by this Board will result in the exclusion of certain individuals, together with their filings, from the said projects, which will result in a depreciation of the value of the improvements placed upon their respective entries to the point of confiscation of such improvements;

"Therefore, be it resolved, That a committee of one be appointed for each of said projects to assess and determine the value of im-
provements placed upon all such excluded entries, and re-
27 port the same to this Board, giving legal subdivisions of land and the name of the entryman with items and character or value of improvements upon such entries; also indicating whether the entrymen at the date of said report was a bona fide resident of the State of Idaho residing upon the entry, or was absent therefrom, or was not a resident of the State of Idaho and was absent therefrom, and that the Land Board transmit such report to the next Legislature for their consideration."

That pursuant to said resolution said State Board of Land Commissioners appointed one C. W. Whiffin as the agent or representative of said Board to select the lands under said project which should be

included in the application for patent and which the said Board intended should be entitled to water from said irrigation system, and also to determine what lands should be excluded from said irrigation system and the value of the improvements as contemplated by the foregoing resolution.

IV.

That thereafter, to-wit: on the 13th day of March, 1918, the Board considered the report of said C. W. Whiffin, and after duly considering the same and entered an order in the form of a resolution, ordering and directing the Governor of the State of Idaho as Chairman of said Board and the Register as Secretary of said Board to make application to the United States Government for patent for certain designated lands under said Salmon River Project, making in the aggregate a net irrigable acreage of about 35,-
28 000 acres and a gross acreage of about 39,000 acres, a copy of which said resolution and order is hereto attached, marked Exhibit "A" and made a part hereof; and said Chairman and Secretary of said Board, pursuant to said resolution and order, did thereafter make application to the United States for patent for said 39,000 acres of land.

V.

That thereafter and on the 15th day of November, 1918, the said State Board of Land Commissioners did make and enter an order in its minutes, of which the following (omitting the description of the lands) is a true copy:

"List of lands under the Twin Falls Salmon River Land & Water Company's project on which proof has been made but not included in list for which patent has been requested was presented to the Board; whereupon the following resolution introduced by Attorney General Walters was unanimously adopted:

"Whereas, This Board with the concurrence of the Department of the Interior has heretofore resolved to apply for patent for lands in the sum of 35,000 acres under the Twin Falls Salmon River Land & Water Company's project, and

"Whereas, The following described lands and entries have heretofore offered final proof, which has been accepted by this Board, and

"Whereas, The same is not included in the above mentioned 35,-000 acres;

"Now, therefore, be it resolved, That this Board will not
29 apply to the United States Government for patent to the State of Idaho for any of the following described land:"

That the lands described in the foregoing resolution and order and for which the State resolved not to apply for patent aggregate about 21,000 acres; and the lands in this answer referred to, viz., the 13,000 acres on which the Carey Act entries were cancelled by order of said Board on November 11, 1916, and the 21,000 acres which said Board ordered and directed should not be entitled to water from

said irrigation system and for which it declined to apply for patent, and the 39,000 acres (35,000 net irrigable acres) for which said Board determined to apply for patent, embrace all the lands referred to in plaintiffs' amended bill of complaint and which it is therein alleged are entitled to water from said irrigation system, and for which it is claimed patent will not issue by the Federal Government.

VI.

That the Department of the Interior has determined and agreed with such State Board of Land Commissioners, as these defendants are informed and believe and so allege the fact to be, to issue patent to the State of Idaho for the 39,000 acres of land for which said Board resolved to apply for patent and for which said Board has applied for patent, as aforesaid.

30

VII.

That some of said plaintiffs own land for which the State has applied for patent as aforesaid, and others of said plaintiffs held entries which said State Board of Land Commissioners have included in said 21,000 acres for which water shall not be delivered and for which the State will not apply for patent, and by reason of the facts herein set forth and the actions of said State Board of Land Commissioners and the Department of the Interior of the United States the said plaintiffs do not, nor does any of them, represent a class having a common or general interest in the questions presented for determination by said bill; that the rights and liabilities of plaintiffs and the persons whom plaintiffs claim to represent in said suit are not identical nor substantially similar, but the rights and interests of plaintiffs and the other persons whom they claim to represent conflict in many respects, and the questions involved in said suit are of such a character that one or more may not sue for the whole or for all settlers or owners of water rights in said irrigation system.

Wherefore, Defendants pray that complainant's amended bill of complaint may be dismissed, with costs to these defendants.

S. H. HAYS,
Solicitor for Twin Falls Salmon River Land & Water Company.

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P. B. CARTER,
Solicitor for Salmon River Canal Company, Limited.

RICHARDS & HAGA,
Solicitors for Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson.

(Exhibit "A" Excluded.)

Filed June 30, 1919.
W. D. McREYNOLDS,
Clerk,
By PEARL E. ZANGER,
Deputy.

(Title of Court and Cause.)

Statement of Evidence on Second Trial under Equity Rule No. 75.

Be it remembered, that this cause came regularly on for trial before the Court sitting in equity on March 24, 1919, on the amended bill of complaint of the plaintiffs and the answers of Commonwealth Trust Company of Pittsburgh and A. C. Robinson and the amended answer and cross-bill of the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company and the petition in intervention of Robert Rayl et al., and the owner of defendants thereto and upon the mandate of the Circuit Court of Appeals of the Ninth Circuit in this cause, Messrs. Sullivan & Sullivan and James R. Bothwell, Esq., appearing for the plaintiffs, Turner K.
32 Hackman, Esq., appearing for intervenors, and Messrs. Richards & Haga, S. H. Hays, Esq., and Albert N. Edwards, Esq., appearing for defendants.

Whereupon, the following proceedings were had:

Mr. Bothwell: I presume it will be proper at this time, if the Court please, to make a statement as to our view of what is now before the Court, or what may be considered by the Court.

The Court: Yes, very briefly.

Mr. Bothwell: It is our contention that the contract as it has been interpreted by the Circuit Court of Appeals provides that one one-hundredth of a cubic foot of water per second per acre is the water right, delivered during the irrigation season, which the construction company agreed to sell to the settlers; that is, if the settler requires that amount of water. That requires an investigation as to what the duty of water is on the tract. That will be the question which we believed we should present to the Court at this time. The other question is the appointment of a Receiver by the Court to take charge of the moneys which are to be recovered by the Trustee, first, because it is apparent from the record that the tract must be reduced. The Receiver must be appointed by the Court in order to collect these funds, to make such application as the Court may determine. Whether in this suit or whether in a later suit, whether the Court shall direct the Receiver to institute a proper action to bring
33 in all parties at a later date, and if the interests appear to be adverse, or whether the Court shall determine at this time as to what the respective rights are, a Receiver must be appointed for that purpose.

Second, the Commissioner of the General Land Office, the State Board of Land Commissioners of this State, have had a hearing upon the questions which are before the Court at the present time, as to the acreage which this water will irrigate. It is here in this decision from the Circuit Court of Appeals that that is a question primarily, or that it is a question, I believe it says, in the absence of fraud,—it doesn't add that, but it would be, under the construction placed upon this contract by that decision, it would be a question for the Commissioner of the General Land Office to determine the patentable area

or the land which could be irrigated, or reclaimed from this water right which was filed upon by the construction company. That question they have determined, the Commissioner of the Department of the Interior and the Land Board. Now, it is the duty of this Court to appoint a Receiver to take charge of the funds which will be derived from the land which is to be patented, in order to remunerate the lands and those who are left without the area for which patent will issue, for this reason: those who are without that area have an equitable lien upon the water which they have cared for for the past six or eight or ten years. The action of the construc-
34 tion company in entering into a contract or contracting to sell more water than it had was an act which in effect abandoned the use of the water which has been applied to this area on the outside, and those who have utilized that water, who have saved that right for the Trustee and the Land & Water Company, should have an equitable lien upon that water when it now is transferred to lands where it belongs, which would remunerate those who have expended their funds in preserving this property for the Land & Water Company and for the settlers who are to get the benefit of it. Otherwise the appropriation would have been lost. A receiver is also necessary to complete the system.

We submit that those are the facts which will be before the Court, and we will offer proof in support of that.

Whereupon G. M. HALL was called as a witness on behalf of plaintiffs, and being duly sworn, testified upon direct and cross-examination as follows:

My name is G. M. Hall. I reside at Hollister, Idaho, and am General Manager of the Twin Falls Salmon River Land & Water Company and President of the Salmon River Canal Company. I have been engaged in *teh* distribution of water under the Salmon River system directly and indirectly since June, 1914. The distribution has always been directly with the Superintendent of the Canal Com-
pany. When I came to the project in 1914, I think the plan
35 was at that time to deliver what was termed a contract head, or at the rate of 1/100 second foot per acre, although very often a much larger head than that was delivered. I think water at that time was run in periods, the same as it has been since. In, I think, 1915 the distribution was broadened, or the heads were enlarged so as to give what was thought to be more effective and efficient delivery, delivering from a head and a half to a double head during the period that water was being run. That was the practice, that has been the practice for the last four seasons.

I think that is the most economical system of delivery which can be adopted on the project. I have the record of the amount of water per acre delivered to the settlers since 1914. In 1914, delivered at the settlers' measuring weir, 2.46 acre feet. In 1915, 8.7 acre inches. In 1916, 1.45 acre feet for the acreage in crop. In 1917, 2.54 acre feet for the acreage in crop. In 1918, 1.23 acre feet. The acreage in crop was as follows: In 1914, 30,064 acres. In 1915, 37,303. In

1916, 39,160. In 1917, 38,500. For 1918, no crop census was taken, but I think the canal superintendent can give those figures approximately correct. I would say that they were around 40,000 acres.

I was employed during this period by the Twin Falls Salmon River Land & Water Company and Salmon River Canal
36 Company. Mr. A. C. Robinson was President of the Land & Water Company at the time I was employed and has been ever since. The stockholders are in control of the Land & Water Company. I have been acquainted with Mr. Robinson since March, 1914. I am acquainted with the other members of the Bondholders' Protective Committee. They are Messrs. G. L. Edwards and J. H. Puelicher. Mr. Edwards lives in St. Louis and Mr. Puelicher in Milwaukee. I opened negotiations with these gentlemen as to my employment in March, 1914.

Whereupon the witness was asked: "Where did this take place?" To which counsel for defendants objected as irrelevant and immaterial and said objection was overruled and an exception allowed. The witness answered, "In Pueblo, Colorado."

The testimony of the witness continued as follows:

I would like to correct my answer. I never opened negotiations with those gentlemen in connection with my employment. My negotiation was with Mr. A. C. Robinson entirely. I met Mr. Robinson and had no negotiations with Mr. Puelicher or Mr. George L. Edwards. I don't recollect that anything was said about the Bondholders' Committee. I was employed by Mr. A. C. Robinson, a contract was made by me for my services with him as President of the Twin Falls Salmon River Land & Water Company. I don't
37 think at that time I knew he was chairman of the Bondholders' Protective Committee. I probably learned that fact in the last few months, at any rate, after I had come to Hollister and taken up my residence there. I don't think at the time the arrangement was concluded that I knew very much about the Idaho project. Mr. Robinson came to me through a man in Colorado whose endorsement of Mr. Robinson was sufficient to satisfy me as to the responsibility of the party that I made the contract with. I never had any business with these gentlemen as a Bondholders' Protective Committee at any time.

As I became more familiar with the conditions I learned that there was a committee representing the bondholders of the different Kuhn projects, the Oakley, the North Side, and the Salmon. I learned that from a meeting at Milner, where I saw those men, some of them. At that time I met Mr. Puelicher. I don't remember whether I met Mr. Edwards then or not,—and others of that general committee,—but I had no negotiations with them, nor I wasn't called into conference at the sittings of the committee. I was there at Milner for the purpose of doing business with the Salmon people, not with them as a bondholders' committee at all. At that time I dealt with Mr. Peulicher and Mr. MacWatters, the General Manager

of all the Kuhn interests in Idaho. Mr. Robinson was not there at that time.

38 I attended a meeting in Chicago, I think, two years ago,—it might have been three years ago,—no—It's two years ago,—at which Mr. Robinson was present, Mr. Edwards, Mr. Puelicher,—no, Mr. Edwards was not present,—Mr. Peulicher and Mr. Durste, of Minneapolis, and perhaps—a member of the committee having the Sacramento project. Part of the time Salmon matters were under consideration, and part of the time other matters were.

I never received any direction at any time from the Committee. It has always been from Mr. Robinson. I was there in Chicago at the request of Mr. Robinson to attend a conference in regard to the Salmon project. They desired information with reference to the Salmon project and I gave it to them. They gave me no instructions concerning the Salmon project. The features that were principally discussed were the proper conduct for the defense of suits that were being brought against the Salmon Company. I don't think the approval or rejection of what I told them was discussed. The only thing of that nature was a statement made to me by Mr. Robinson, that he had no suggestions to make as to the conduct of the affairs of the Salmon project, that I was there, and he said to go along as we had been doing.

A portion of my salary comes from the Twin Falls Salmon River Land & Water Company and a portion from the Salmon

39 River Canal Company. The offices of the Salmon River Land & Water Company are in Pittsburgh. The office in Idaho is a branch office. We have no knowledge of the general books or affairs of that company. All I know is that I receive a voucher from Pittsburgh signed by Mr. A. C. Robinson, as President of the Twin Falls Salmon River Land & Water Company, and I get the money on it.

I wouldn't think necessarily so. At the time I came to Idaho there was a representative in Idaho who was recognized, a man who was recognized as a representative of the bondholders, Mr. Green. I had a general knowledge that there was such a thing as a committee representing the holders of the bonds, that they had been obliged to organize to protect their interests, Mr. Green was never in charge of the project, nor did he have anything to do with it. I came out and I was put in charge of it.

I made a statement some thirty days ago before the Land board that the bondholders didn't have any more money to put into the check basin, or words to that effect. The source of my information was advices from Mr. Robinson, as President of the Land & Water Company, or from Mr. A. C. Robinson, without saying what his title was, but all the communication from Mr. Robinson to me are as President of the Land & Water Company.

I am Vice-President and General Manager of the Land & Water Company and President of the Canal Company. I have never

40 made any examination of the assets of the Land & Water Company. I hold one share of stock in that company. I do

not know who voted to elect me Vice-President of the Land & Water Company. I received the information that I was Vice President of that company along in the summer in 1914 in a letter from Mr. A. C. Robinson, president. The Canal Company elects a superintendent. I vote the stock of the Canal Company. Under proxy from the trustee, I vote some 53,000 shares. The shares are assigned to the trustee and held as collateral. The Commonwealth Trust Company of Pittsburgh is trustee. They send me a proxy with authority to vote the shares. Nobody directs me how to vote them. I determine how to vote them by using my judgment. I do not take that matter up with Mr. Robinson or any of the other members of the Bondholders' Protective Committee. I think about 30 or 40 shares in addition to those I vote are voted. Some are voted by the Secretary, some by individuals.

I succeeded D. C. MacWatters as Vice-President and General Manager of the Land & Water Company. The records of the office show that he had held that position for several years. The main office of the Land & Water Company, where its stock books and minutes of meetings of the directors and stockholders are kept is in the east. I have never attended any of the meetings of the stockholders or directors. The information I receive as to who are
41 the officers comes from Mr. Robinson. That has been true during all of the years I have been an officer of the company.

Why, once in a while some representative of some one holding a block of bonds comes out to the project and asks to know how the project is getting along, and I give them what information I can as to the general situation. I make no reports to Mr. Peulicher or Mr. Edwards. They have never asked for any. I don't know whether Mr. Peulich*ed* has been there since I have or not. I don't think I ever saw Mr. Peulicher on the Salmon project. Mr. Edwards has been there, I think possibly twice, perhaps once. I have no personal knowledge of who constitutes the Bondholders' Committee. I have information just the same as we know things we read in the newspapers. I think the so-called Bondholders' Committee is composed of a large number of members and the men I have referred to are only a few of them. There are some 12 or 15 men on the committee of whom I have personally met or seen, 4 or 5.

In 1914 when I went on the project there were some negotiations of settlement pending with the farmers and for that reason the Bondholders' Committee, or their representatives, were represented on the project. Early in 1914 negotiations were on, and they were on in March, 1914, and I might say have been continued in an intermittent way ever since. These negotiations were of such char-
42 acter that the bondholders would have to participate as their interests were involved. It was in that capacity that Mr. Green was on the project. I think that has been the occasion for Mr. Edwards being out on the project. He negotiated with a committee in Twin Falls. I was not present, wasn't asked to be, had nothing—all I knew of it was what Mr. Edwards told me casually afterwards, told me afterwards.

I did not represent the bondholders or the bondholders' committee

in negotiating with the settlers and was not present in the conference. I was at Milner in 1914 to get information. That was the office of the Land & Water Company. It was moved to Hollister in the late summer or fall of 1914. Mr. Puelicher and others of the general committee happened to be there.

There has been a reduction in acreage covered by outstanding water contracts on the Salmon project since 1914. A little over 13,000 acres has been eliminated. Deliveries of water have been made to settlers by rotation or by periods. That has been in the interest of efficiency and better service to the farmers. There has been no discrimination in water deliveries. Distribution is made according to the number of shares that a person owns in the Canal Company, giving each settler his proportionate share or part of the water.

43 I got my information as to the members of the Bondholders' Committee mostly from Mr. Green, who was on the tract or in Twin Falls when I came out in June, 1914, and also from meeting some men in Denver who I was told belonged to the committee. This was before my employment. I didn't know at any time that the bondholders were in charge of the project. I knew there was a committee representing the holders of bonds of the several Kuhn projects. I knew that Mr. Green was representing their interests which were involved in an adjustment with the settlers, or I would say that Mr. Green called himself Mr. Robinson's personal representative. I knew that Mr. Robinson was reported to have been out here early in 1914 negotiating. The bondholders' interests were involved because it was reported that the interest on the bonds was in default. The Land & Water Company could not pay the interest, as I understand it. I know that the revenue from the collections from debtors to the company has been very limited in the last four years. I know as a matter of fact that the settlers haven't paid their water contracts. The Land & Water Company has received no funds from Idaho. I had a circular or pamphlet in my possession on February 6, 1918, from the Bondholders' Protective Committee, giving information. I don't remember its date or what it contained. On that date I informed Mr. Beauchamp as to the names of the bondholders on the various Kuhn projects,

44 naming Robinson, Edwards and Puelicher as the committee that was in charge of the Salmon project.

I will qualify that answer. I don't know that I ever told him or anybody else that they were in charge of the project. I told him those were the names of the bondholders' committee representing holders of bonds of the Salmon project.

This 13,000 acres that was eliminated was land for which contracts had been issued. The entries were cancelled by the Land Board after notice requiring the parties to make proof. When they failed to make their proofs the Board cancelled a number of entries on which the contract acreage was something over 13,000. Contracts are now outstanding for 60,170.8 acres.

The water has been delivered by rotation or periods. I think I would say both. The water has been run in periods, there has been

periodic deliveries or rotated between the reservoir and the entire system, and instead of delivering it at what is commonly called contract head of one 1/100, the deliveries have been at a better rate of flow and for such period as there was a general demand and the crops required the water. One reason for this method is, greater efficiency on the land, because a small head results in a larger per cent of loss in getting the water through the laterals and through the corrugations, a saving in labor in applying the water, because it gives the user a head in proportion to his ability to care for it, instead of wasting time with a small head, smaller system losses, because of shortening of the time that the canals and main laterals are subject to seepage losses. Those are the three principal advantages of periodic delivery. And then another, that it permits of a more timely application of the water to the crops, because of the over-size or the—not over-size—the extra size of the canals and laterals on the project, it is possible to make deliveries at a very much larger head than was contemplated when the project was planned, which is a great advantage to the water users, because the water is applied at the time the crops need it. The extra size of the ditches is of great advantage to the water users. On this account we are able to make these periodic deliveries.

In answer to questions by the Court the witness testified as follows:

A share of stock was given to me in each one of the companies to qualify me to hold office. I couldn't say as to who gave me the share in the Land & Water Company, but the share in the Salmon River Canal Company was transferred to me by A. C. Robinson. I paid nothing for either one. I am President of the Canal Company, the operating company. The superintendent of the canal is its manager. The superintendent is elected by the Board of Directors. I vote the majority of the stock and thus select the board. I vote this stock by virtue of the proxy I receive from the trustee. When the contract was made the canal stock was put up as collateral. I had no real interest in the company. I never received any specific instructions, but when I hold that proxy I undertake in good faith to vote the interests of the trustee. I wouldn't accept a proxy unless I did that. When I select members of the board, I select men who will vote for what I consider the true interests of the project and for the employment of the best employees and agents and to give the most efficient management of the Canal Company.

I do not participate in the management of the affairs of the Land & Water company. I take my directions exclusively from Mr. Robinson. He is President of the company. I never stopped to inquire what authority he had to direct me. I took his word for that. All I know about it is what Mr. Robinson has written me. My information comes through him in the forms of letters or when I see him. We have letters frequently from the Treasurer of the Land & Water Company and from the Secretary and the Vice-President. I am the second or third Vice-President. There are a number of the

water users or settlers on the project who are members of the Board of Directors of the Canal Company. They have declined to accept the position. I think Mr. Edwards asked representatives of the settlers to nominate three men. I think I talked with Mr. Mikesell,
who is an officer of the Settlers' Association and Mr. Douglas.
47 I am not sure whether I talked with others or not. Mr. Douglas and Mr. Mikesell declined to serve as directors. I don't remember that they gave any reason for not wanting to serve on the Canal Company at that time. At another time they gave as a reason that they do not want to assume any responsibility for the operation of the Canal Company for the operation of the project. This conversation with Mr. Mikesell took place shortly following Mr. Edwards' conference with the settlers and a meeting in Longley's office, of the Directors of the Settlers' Association Board and a number of other settlers, at which I was present. I think it was in the fall of 1916. No one directed me to talk to Mr. Mikesell about it. Mr. Edwards told me of his request to the settlers' committee that they select three men for Directors on the canal board. There are nine members of the Board.

Mr. Edwards was working to effect a compromise or reach a settlement with the settlers on that project, and believed that the representation of the set-lers of the board would be advantageous and beneficial to everybody. He came as a representative of the bondholders. I had a conversation with Mr. Douglas along about the same time. I think Mikesell's reply was about to this effect, that the matter had been discussed and it had been decided not to participate in the management of the Canal Company, it had been decided that such
steps were not advisable. I intended if he should accept to
48 vote for him as director. I intended to vote for three men that would be nominated by the settlers, whether it was Mr. Douglas or Mr. Mikesell, or whoever they might pick on. I don't know that I can remember who were the directors at that time. Mr. Champlin, the Secretary of the company, was one. I don't remember—I can't recall whether Mr. Ward was one at that time or not. I think Mr. Drake (?) and myself, and I don't remember who the others were. Mr. Robinson was one of the directors.

Mr. Puelicher and Mr. Edwards have never been on the Canal Board. None of the bondholders, besides Mr. Robinson, were members of the Canal Board. I can't remember what Mr. Douglas said when I talked to him. My recollection—it was the same general conversation—I don't know whether the talk was limited to talking with Mr. Douglass and Mr. Mikesell. The decision was reached that the settlers should not go on the Board at a meeting of the Directors of the Settlers' Association, at which there were several settlers present who were not on the board. Mr. Edwards was not at this meeting. That was after he had gone back.

J. C. PORTERFIELD, being produced as a witness on behalf of plaintiffs, upon being duly sworn, testified as follows on direct and cross examination:

My name is J. C. Porterfield, residence, Twin Falls. I am superintendent of the Salmon River Canal Company. I have
49 been so employed since the first of January, 1918. I have had, so far as construction work is concerned in connection with the work, in the way of maintenance work, probably fifteen years' experience, maybe twenty; I couldn't say exactly,—fifteen years at any rate,—in general construction work, in irrigation projects. So far as the handling of water is concerned during the irrigation season for irrigation purposes, three years on the South Side Twin Falls Project. I have made an examination of what is termed the check basin on the Salmon River Project and made a report on it to the Canal Company.

Whereupon, the following proceedings were had:

Question by Mr. Bothwell: "What did you find to be the objectional features of that check basin as it is at present?"

Mr. Haga: If the Court please, I don't see what bearing that has on the issue in this case.

The Court: What is the materiality of it?

Mr. Bothwell: The question is this, if the Court please. It is our contention that a Receiver must be appointed in this case to take charge of this system, to complete the system, to complete this check basin. We expect to develop from this witness that the check basin was built, or rather land was utilized there which was very unsafe, and has now required a great amount of money to be expended, and that they are in the process of doing this construction work at the present time. The record already shows that the bondholders
50 have made the statement that they haven't got the money to do it. We expect to show further that they have made an attempt to charge this to maintenance for this year, that there is an action pending to determine that question, and that they have so far proceeded with the work that the entire system is imperiled down there, that is through this check basin. We expect to show by this witness that they have taken off what little dirt there is over the lava rock there and built up a ridge down through the basin of a few feet high, and that it is impossible to use the system as it is at the present time. That the bondholders have refused to put up the money for it, that it is a construction charge, and that they have attempted to make it a maintenance charge, and therefore we insist that a receiver is required to take charge of the project; also that this will find more water. We expect this witness to testify that there is an excessive loss of water in this check basin as it is presently constructed, that more land can be brought under cultivation providing this is done. We also expect to show that the parties who are now in charge of this system have adopted the advice of the Commissioner of the General Land Office, in which he stated that this improvement should be made, that the check basin, the losses in the check basin should be overcome, and that he would patent an area of 35,000 irrigable acres. That they have started to proceed in ac-
51 cordance with that, but in place of fulfilling their original view or intention, that they have now sought to charge it

against the settlers as maintenance; that it is not a maintenance charge, but purely a construction charge, and that unless a Receiver is appointed to take charge of the system and go ahead and complete this work, that there is very grave danger of no water being delivered this year and the entire system being imperilled, and that in last year's maintenance charges, which were charged against the settlers they appropriated $7,000.00 in cash and issued $2,000.00 in certificates of last year's maintenance, which they have used to build this little ridge through the check basin, and it now stands in that condition. They were without funds themselves to do that. At least they didn't use their own funds for it.

Further argument omitted.

The Court: Of course this evidence might have some bearing upon the question of the appointment of a Receiver. I can't see its materiality to the ultimate issues. I wasn't aware that you were making application for a Receiver at the present time.

Mr. Bothwell: Well, we are urging, if the Court please, the appointment of a Receiver, in conformity with the prayer and with the bill of complaint, in addition to the question as to the duty of water and the question of injunction, enjoining proceedings. That is one of the principal reliefs asked for in the original suit,
52 and of course we have not abandoned that position.

The Court: The difficulty about it is, you are going into the conditions which didn't exist at the time the suit was commenced, or at the time of the former hearing, as I understand. You are going into a present condition. I think there was some testimony touching this catch basin, as it is called, at the former hearing. I don't remember just what bearing it had, but I remember it as a feature of the canal. At least at some of the hearings here that feature has been brought to my attention.

The Court: Well, I think I shall overrule the objection.

The witness continued as follows:

The principal objection was the element of hazard that entered into operating the check basin as it then existed.

The check basin originally covered approximately ninety acres, its maximum use, that is, during the peak of the irrigation season, when the water surface was at its extreme height, and in one particular locality of the check basin the bottom was treacherous, and large holes had at one time developed and been diked off, so that that particular locality was no longer a part of the check basin. But still in that immediate vicinity there were holes occasionally developing, and there was considerable anxiety in connection
53 with operating the check basin, due to the fear that other holes would develop during the period of irrigation that would require shutting down the system at a time when the water would be needed very seriously, and any shut-down of the system might work distaster to the — than necessary for the operation as a regulating basin, which it fills, to some extent, to a considerable extent, holding the water in a comparatively quiet stage for the regulation by the

gates at a point about three-quarters of a mile below the check basin itself. This, of course, exposed an unnecessarily large amount of ground to ordinary seepage losses, which can be determined with some fair degree of accuracy, and are about the same thing for most any earth conduit; also a large surface to evaporation, unnecessarily large. The main objection I considered the hazard in operation, and it was on that ground that I recommended that as much of the check basin as practicable in connection with its necessity as an equalizing basin be eliminated. The check basin is somewhat saucer-shaped, a good deal longer in the direction of the canals than it is cross-wise of the line of the canal; and it is the portion that is, you might say, in the center of this depression that is below the grade of the canal, and covered somewhere in the neighborhood of twenty acres, I believe, that never did drain out.

Well, if the periods of the running of the water were far enough a part so that this depression that was below the grade of the
54 canal should dry up between the runs of water, there would be perhaps twenty or twenty-five acre feet of water required to fill this up again before the water would run on down the canal, there being some water left in there after every run. And if the period was long enough before other water was run in, of course that was an absolute loss; there was so much loss every time the canal system was shut down and operation resumed again. There was no unsual loss of water this last year. There were such losses in 1912. I don't know whether at any other time than that or not. The basin is covered with a deposit of soil from two feet up to eight or ten feet in thickness, at any rate. I don't know—we haven't dug holes enough in there to tell just exactly the thickness all over the basin, but it varies from two feet to at least eight or ten. Under the soil there is a hard pan, what is commonly known as a hard pan formation in most places where it has been opened or disclosed in any way. And then below this, so far as is known, there is a lava formation. The soil rests upon a hard pan formation, and this on a lava formation, lava rock. It is true particularly in the northeast part that under a thin layer of comparatively impervious soil lies a formation that is gradually becoming softened so that it gives away, allowing the soil to settle and consequently it and the water to escape through the fissures in the underlying lava.

55 The means adopted to improve this check basin was the construction of an embankment to the west of the center line of the basin, the basin lying very generally in a north and south direction, that is, the long direction of it. And we proceeded to eliminate as much of the check basin as possible by the construction of a bank through the check basin, the location of which would not necessitate any of the—the removal of any of the soil from the bottom of the check basin, as it would be after the improvement. I don't know whether I am clear on that or not. The construction of one single embankment would leave a considerable acreage in the northwest part of the basin still subject to ordinary seepage and evaporation, although it was not a treacherous part of the basin,

never had developed any crevises there. And it was also recommended that an additional bank be built through the lower part of the check basin so as to cut off this northwest area, so that the lower half of the check basin would all be done away with except a canal about fifty feet in width, this canal being all built in embankment, no excavation being done.

We don't expect to put in the second embankment this year on account of the time. If we had time to do it we would.

I estimate the cost of the improvement, the total of the one bank, based upon the cost of the work that has already been done, the estimate for the purpose of maintenance assessment for this year,
56 the total cost of the bank, the one bank being completed, as $27,000.00. That, however, we can materially reduce the cost of that by letting a contract, I am aware of that now, so that the cost of that one bank will not be as much as that. The other bank would cost about $9,000.00 at the same expense, that is, the same expense per yard, the same proportionate expense.

There will be about 2,200 feet of the check basin at the time it is full of water. The water surface will be from 250 to 300 feet wide, the width of the water surface, depending upon the height at which the water is being run, that being the maximum, 250 to 300 feet. And then the width below that would be about 85 feet, 80 feet, 82 feet, to within about—oh, perhaps six or eight hundred feet from the present end of the check basin, when it would widen out again to three or four hundred feet; I can't say exactly as to that, but then something,—that is as near as I can tell you without the maps, and I haven't them here.

Well, there never has been any trouble to the west side of the location of the bank, so far as I know. There has been trouble on the east side, and there has been a little right at the upper end of the check basin on the east side, but very little compared with what is at the lower end of the check basin,—just small holes developed which were fixed without any particular trouble, and never gave any more trouble so far as I know. The soil has every indication
57 of being better on the west side than on the east side. I am basing my statement very largely on the fact that there has not been any trouble there. We havent' done any sinking in the soil to amount to anything, so that I couldn't give you the depth of the soil from the standpoint of having actually measured it, because we have let it alone just as much as we can, don't do any excavating at all on the west side of the embankment.

We do not propose to dig any test pits to ascertain the condition of the soil and the formation there. Test pits have been dug at some time previous, which I have never made any examination on, but which I have seen a report of, in the west part of the check basin or along the outside of the check basin to the west. I couldn't say just where they are, but they disclosed rock at a depth of five or six feet, or somewhere about that, so that a canal five or six feet deep, that is, cut with a depth of five or six feet around the west part of the check basin would go into rock work.

It would be advantageous to build another dike on the west side if the embankment that we are building at the present time were to be left as the only construction through there it should be raised higher than we are raising it to protect against wind action, due to the wind blowing across the wide part of the reservoir, creating waves that would tend to tear the bank down. If the additional em-
58 bankment is built, then the height to which we are building it is sufficient. I would consider it desirable to build this other bank. The greatest heighth the bank will be above the ground will be a little over 11 feet. About one-third of the east bank is now completed. The embankment does not follow the exact flow line of the canal and part of it is built on ground somewhat below the grade line of the canal. If the check basin was used with enough water to irrigate the whole tract, the bank in its present condition would be submerged. We can run some water and have run some. We got the earth to build the present dike from the portion of the check basin that is to be eliminated. It is on the east side of the embankment, and would be about 150 feet wide, and I should judge for a distance of about 3,000 feet. We were down to a boulder formation in one or two places, but not to any solid lava rock anywhere. We propose to get the remainder of the dirt from the abandoned area of the check-basin. The cost of another embankment to the west would be $9,000.00. That is the only one that I would consider necessary to prevent the wave action. That is the only place that the check basin would still be wide enough to create any very extensive wave action.

It would not be advisable from an operating standpoint to confine the water to a closer area than from 250 to 350 feet wide. There has got to be about as much of a basin left as that for what
59 is ordinarily termed an equalizing basin, or something to take care of the discharge from the tunnels. It is impossible to operate closely from a reservoir under such pressure as we have there and regulate the amount of water we turn out directly from the gates from the reservoir. It has to be turned out into this what we might term an auxiliary reservoir, and from that, having some little leeway from that.

I tried to explain why it is necessary to have a check basin. You can't measure the water close enough under the gates under that pressure. If you discharge it right into the canal it would overflow the banks and you wouldn't get the desired amount. It would be either above or below—too great a variation.

There has been $7,000.00 in cash expended so far on this work and $2,000.00 worth of maintenance warrants to be applied on the 1919 maintenance charges. The $7,000.00 came out of the item in the 1918 estimate filed with the Land Board for general maintenance work. This work in 1918 was done in September, October, November and December by the Salmon River Canal Company. It was done by day labor. There was an attempt made to get help from the farmers, but they were busy with their fall work, that is, none of them responded, that is, scarcely at all. We hired the teams

wherever we could. The matter of doing this work was
60 taken up with the farmers' organization, the Settlers' Association, by furnishing them a copy of the plans and a copy of my report to Mr. Hall, that is, furnished it to the President of the Association, Mr. Carter, and told him exactly what we calculated to do and how we calculated to handle it, and then I had printed several hundred notices that I posted on various parts of the tract, just wherever the ordinary sale bills were in the habit of being nailed up, I nailed these up, advertising for help, for men and teams, giving the wages that I expected to pay, and the gist of the advertisement was that we were going to work on the check basin a mile and a half from the dam, and wanted men and teams, and gave the wages, and also stated that the work for single handed labor, including the drivers, would be paid for in cash, and the amounts due for the hiring of teams would be paid for with maintenance certificates to be applied on 1919 maintenance.

These notices were over the name of the Salmon River Canal Company signed by me as superintendent. The part of the bank we worked on is about 3,800 feet long. As we go higher it will be longer, the whole bank by the time it is completed will be, I think, 4,800 feet long. The bank will only be 11 feet high a short distance. It varies from that to nothing. The wind action can be protected against by the rip-rapping. It would be serious if you were just going to build an earth bank and go away and leave. We have let a contract with the Morrison-Knud-
61 son Construction Company for the completion of this bank. I let it as superintendent of the Canal Company. They are to start work not later than the 31st of March. They have hauled hay and grain on to the work already and are getting their outfit on the job. The contract price was 45 cents a yard. We haven't determined the yardage exactly but it is in the neighborhood of 38,000 yards, which will make the cost of that one bank about $24,000, including what we spent last fall. I should have said $22,000, $13,500 will be about the amount paid Morrison-Knudson as near as we can tell until we have absolutely cross-sectioned the work. We propose to pay that out of maintenance charges which have been levied.

I have compared the efficiency of the system in the way of water deliveries as compared with the efficiency of other irrigation systems similarly situated and it compares very favorably. The transmission losses are in the neighborhood of thirty per cent, very rarely in excess of that, that is, for the system as a whole, which is to be considered very good for a system of that size, the distance that the water is transported. I couldn't consider the *the* work that has been done on the check basin justifiable simple as a commission proposition as to the amount of water saved. There will doubtless be a little water saved. The losses were so reasonable as compared with other systems that there couldn't have been any ex-
62 cessive losses during the years I have gone into the records. I couldn't see any indication of losses that would justify the

construction merely from the standpoint of the water being saved that was saved year by year or would be saved. As to 1912 I only know that when these holes broke out there was such a loss that they couldn't put water, or enough of the water as was desired into the canal known as the "A" canal. That is just as I have heard it. The hole or holes that developed were cut off from the basin by a bank and no such holes developed in later years. I have examined the plans under which the system was constructed and which were approved by the State Board and the State Engineer for the system. These plans do not call for a canal such as we are now building or for any canal through the check basin. The check basin is just a natural depression. The only construction in connection with it is for the discharge from the canals into it and the outlet canal out of it. It was adapted to use as a regulating basin and served that purpose but it was originally larger than needed for that purpose. I have never gone below the lava rock to see what there is underneath. We have uncovered the hard pan in some of the excavations in a place or two, but we haven't developed any holes at all in the work so far. The transportation system in the whole distribution system from the measuring station, which is between the two tunnels, to the
63 farmers' headgates the loss varies for the different years from twenty-seven to thirty per cent. That includes the check basin. In my report to the President of the Canal Company I referred to the changes that might be made. The canal might be built either through the basin or around the basin. If the canal was built at an ordinary canal width through the entire length of the basin it would not operate satisfactorily as an equalizing basin. I didn't recommend the construction of a canal through the basin. I said that a canal might be built through it which would require about 100,000 cubic yards of material, estimated at that time at twenty cents per yard, but I didn't recommend it. I recommended a compromise between the two. I estimated the whole thing would cost about twelve or thirteen thousand, estimating that the dirt could be moved for twenty cents a yard. The work is costing very nearly three times as much as I estimated it would cost before we started the work at all. We have the assurance to the extent of $2,000 deposit of Liberty Bonds that it will be done for the price of $13,500, and the ability of the contractors to perform the work, and that is all the money they will get for it. This firm of Morrison and Knudson are experienced contractors. I have known Mr. Morrison for fifteen years and Mr. Knudson for four or five years.

In answer to questions by the Court the witness testified as follows: Basins of this kind are considered standard or very
64 advantageous in connection with any irrigation system. The Murtaugh lake on the South Side Twin Falls project is a very large example of this same kind. It was left there very largely for the closer regulation and the quicker regulation of the water down below on the tract. It covers twelve hundred acres I believe,—I guess eight hundred is right, or several hundred acres though.

The matter of economy entered into it very largely, but it was considered as an advantage to the operation of the system. That element entered into it There is none on the Oakley project. That is a reservoir project and there is no opportunity, no chance for anything of the kind there. I don't mean to say they couldn't get along without it, but it is very desirable to have. I venture to say that we can regulate the water, the operation of the Salmon tract can be carried on more closely to the amount of water desired than it can on the Oakley tract, just for that one reason. The Oakley project would be better if it had something of that kind. The water has to be measured some place, and measured—the line of communication, or the distance from the reservoir gates to the operating gates, is something over two miles on the Salmon tract, and it couldn't be made any less than that, due to the topographical conditions, and couldn't be otherwise, and the water would either have to be measured so far as the practical operation is concerned, either by computing the flow through the reservoir
65 gates, which of course have a very small opening when operated under a high pressure, when the reservoir is full, or it would have to be measured at the cut where we do measure it at the present time, and that would have to be the point of measurement to determine whether the amount was in the canal that was required for the orders for that day, the farmers' demands, so as to meet the demands of the farmers, or there would have to be a method of communication which would be dependable from the gauges below the headgates of the "A" canal and the main canal, which are two miles away, and the line of communication couldn't be depended upon absolutely, and the time taken for the water to travel there would be long enough so that the operation, the determination of the amount of water actually in the canal, where they are being changed every day,—we don't run the same amount of water every day,—where these amounts are being changed every day it couldn't be regulated to as fine a point from the reservoir as it can from the gates down at the canals, and operated where the man at the gates has full control of the operation, and the gauges are just within a very few feet of where he is operating the gates, instead of two miles from where the man would be operating the gates, if we tried to do it the other way, without the check basin. If the man operating the gates two miles below closed them down that would raise the level of the water in the check basin under present conditions unless the man at
66–79 the reservoir shuts his gates. There is practically no fall through the check basin and the outlet canal, there is a little, something like sixteenths, but the flow of the headgates at these canals is about six-tenths of a foot lower than the discharge end of the second tunnel, two miles way. No it isn't two miles away, it is a mile and a quarter. I have computed the area the surface of the water would be in the so-called check basin after the two embankments were constructed, and it is all on maps where it shows up very plainly, but I can't tell exactly what it is at the

present time. It is something less than fifteen acres, total water surface. I didn't bring any of that here, I didn't have any idea it was going to be called for.

* * * * * * *

80 F. A. WILKIE produced as a witness on behalf of plaintiffs
81 being first duly sworn, testified as follows on direct and cross-examination: My residence is Boise, Idaho. Occupation, Civil Engineer. I have been engaged in the practice of engineering about fifteen years. I am not a graduate of an accredited school of engineering. I have lately occupied the position of State Engineer of the State of Idaho. I have examined the irrigation project known as the Salmon River project and what is termed the check basin, and also the plans and specifications with reference to the construction of the Salmon project on the north and east corners of the check basin there were some large holes where the water had cut through the soil on top of the underlying lava rock. On the theory of the original design of the system I think the check basin was considered necessary in operating the system and some of the other designs or some of the other conditions in connection with it would seem to require it. The check basin is a natural depression in the ground, extending about 5,200 feet northward from the mouth of the tunnel, tunnel No. 2, and afforded an opportunity for conveying water that distance without any construction work, and was made use of evidently by the designers of the system at that time for that purpose, and the canal constructed out of it from the north end through a rock cut. It seems—I would thing the design
82 was at that time to make it serve two purposes, *to serve two purposes*, to check the velocity of the water out of the tunnel, and to form a kind of an equalizer for the heading of the two canals, where it forked about 3,400 feet further north from the north end of the basin. Looking at it from the point of standard construction at the time it was built, Mr. Wilkie, would you say that the check basin was necessary as an equalizer in the operation of that system?

Mr. Haga: Objected to as irrelevant and immaterial as to what the witness may consider necessary. The plans and specifications approved at the time would be the only controlling feature with reference to that. Engineers might agree or disagree on that. If it was built according to the plans and specifications approved at the time, I think that would be conclusive.

The Court: I think I shall let it go in, although I have great difficulty in seeing its materiality. But in order that the record may be complete it may go in under the objection. You may answer the question, Mr. Wilkie.

The witness continued as follows: I think as a matter of actual necessity to the system, that it was not necessary, but other features of the construction in connection with it were designed and based upon that use of the check basin, so that, taking it altogether as

the system is constructed now, there would have had to have been some other changes to have taken the place of the check basin had it not been used. I think that the system, viewing it as
83 we see it now, I am of the opinion that the system would have been better had the check basin not been used, if the other features had been designed accordingly. The check basin, the theory of the check basin was that it would gather up a volume of water, that is one theory of it at least, reduce the velocity from the tunnel, without constructing any other device to do it, and the water in it could be raised sufficient to make a head to take the water out through the rock cut and into the main canal and the "A" lateral. Now, the heading of the "A" lateral and the main canal, which are a little over—nearly two miles from the tunnel, are only six-tenths of a foot lower than the mouth of the tunnel, so there isn't proper grade during that length for an open canal, and the check basin is used to create a head to force the water through the rock cut and into those canals in lieu of the fall between the mouth of the tunnel and the heading of those canals. I hardly think if they had designed to build the canal from the mouth of tunnel No. 2 to the head of "A" lateral they would have designed it with so little fall. I understand that with the present grade it still has to operate as a check basin. The banks of that canal that they are building now are supposed to be built high enough so that the water can be backed up in the canal enough to create a velocity head for the rock cut and the headings of the ditches, of the "A" lateral.

Well, yes, it probably would have been better in the first
84 place. It would have reduced the hazard. Of course, there is hazard in the canal banks through there, and they occupy a portion of the bottom of the basin, but of course the hazard is eliminated and the seepage is eliminated and the evaporation is eliminated to some extent by the work that they are preparing now. The office of that basin as it is proposed to be improved will be to regulate the water as it passes through the rock cut and is delivered to lateral "A." It will have to be used as a place to accumulate a head to give the velocity through that cut. The cut isn't large enough to draw sufficient water, and there isn't fall enough to draw sufficient water, without a head in the basin to create the velocity. I don't think it would be required as a regulator in order to measure the water as it comes from the tunnels. If the rock cut had not been lowered sufficiently and the "A" lateral and the main canal had been lowered sufficient to give a grade in order to secure velocity the canal construction could have been made through there. I don't know where the established grades are or how much they would have to be lowered. They would take something over a foot.

I have examined the check basin three times. I have been over other parts of the system rather thoroughly as State Engineer and while I was deputy State Engineer. I never made any tests of the losses in the check basin. I have only investigated records and talked with as many people as I could find who had informa-
85 tion on the system. Well, the actual losses that we have been able from the records, that I have been able to examine,

have not shown a very material loss in the basin, although before I ever saw the basin those large holes I referred to had been diked off, a bank had been built around them, and the measurements that have been taken to determine losses in the check basin include in their area also 3,400 feet of the rock cut. The measurements of the water going out of the basin were made 3,400 feet below the basin, so that the losses actually attributable to the basin have not shown up large on the records. The measuring device above the basin was at the head of tunnel No. 2. It is about a quarter of a mile long. The measuring device below the basin was a little ways above the head of the main canal, about three thousand feet below the basin outlet. Between the two measuring devices we have tunnel No. 2, the check basin and about 3,000 feet of rock cut below the basin. The losses in that strip of tunnel, canal and check basin don't seem to be excessive. I know nothing of the gathering of the records. I simply computed the conclusions. The losses don't seem to be very excessive for the number of acres covered by the basin. The losses in the system as a whole did not seem excessive. The records that I got I got from the Company and scraps of data that existed in the State Engineer's office. The bank that was built

86 to cut off the holes that existed in the northeast corner of the basin which had developed in early years on the system was in very good condition about a month ago. I am informed that the dike was built early in 1912. I haven't seen any holes which have developed in the last five or six years that have seemed hazardous. I have heard that some have developed and been repaired, but I have no personal knowledge of that. I didn't find anything serious from my examinations except those that were diked off. From my investigations I concluded that it may not have been entirely necessary to build this bank except as eliminating the element of hazard. I think it is desirable for that in reducing the area of seepage and the liability to break holes through the soil. The soil blanket in the check basin ranges from four to twenty feet thick. It seems to be underlaid with a broken up pile of rock. Such depressions as this check basin have been taken advantage of in the construction of irrigation works to avoid artificial structures. Considering the fact that the water is discharged from the reservoir under great pressure directly into the canal or tunnel, some sort of a device for checking the velocity of the water would have to be provided and it seems to have been the theory of the designers to take advantage of this basin for that purpose. They were also able to maintain the canal below at a higher level than they otherwise

87 could. Such depressions have frequently been taken advantage of by other systems to avoid artificial construction. The witness thereupon identified as plaintiffs' exhibit No. 1 a copy of the report made by him as State Engineer, and Mr. W. G. Swendsen as consulting engineer, and the same was offered in evidence and it was stipulated that the record might show that Mr. Wilkie and Mr. Swendsen had signed the original report. Said report was admitted in evidence without objection and is as follows:

"Office of the State Engineer, Boise, Idaho.

March 4, 1919.

State Board of Land Commissioners,
Capitol Building,
Boise, Idaho.

GENTLEMEN:

Pursuant to your instructions, I, in company with Mr. W. G. Swendsen, left Boise on Monday evening, Feb. 24, 1919, for the purpose of making an examination of what is known as the check basin on the Twin Falls Salmon River Project, arriving at Hollister in the afternoon of the 25th, and going immediately to the dam and outlet works of the system following them from the dam down through the check basin to the head of the A lateral, making a careful examination of the check basin and the conditions of the same, and incidentally visiting two other places on the system at the request of settlers. On the following day we examined the records of water delivery and losses and all maps and data in the office of the company at Hollister and returned to Boise that evening.

We have gone carefully through all the records in the
88 State Engineer's office and all abstracts upon the records of the Land Board, and carefully considered all of the same and the following is herewith presented to you as our report:

General Description.

This basin is a natural depression in the earth's surface, such as are common throughout the lava plains of Idaho, and prior to the construction of the canal leading therefrom the same had no surface outlet. It appears not to have been formed by erosion but is rather the result of a pothole or depression in the underlying lava upon which has been deposited, by wind and erosive action, a layer of rather light lava soil or silt of varying depth.

The basin is surrounded by a rim of outcropping lava ledges and forms what might be a remnant of a small volcano or crater. It is located near the head of the main canal as shown on Exhibit A attached hereto.

Original Plans.

A general plat or plan showing the location of the entire proposed canal system was approved by the State Engineer and the State Board of Land Commissioners, February 13, 1911, and a print copy thereof, showing such approval, was filed in the office of the State Engineer, March 3rd, 1911.

This plat shows the location and general outline of the check basin, the main canal leading thereto and therefrom and discloses the general plan to use the same as a part of the main canal.

Exhibit A attached hereto is a copy of that portion of this general map covering the territory occupied by the check basin and the coun-

try adjacent thereto, upon which is indicated the title of the map and the approvals herein above mentioned. As will be noted, this map is called "General Map and Index to Detail Sheets."

89 These detail sheets are merely maps drawn to a larger scale and show in some detail the location of the contemplated works and structures in addition to certain topographic and other data.

Detail Sheet No. 78 covers the check basin country and while a considerable number of these sheets are on file in the office of the State Engineer, the same bear no stamp of approval and Sheet No. 78 is missing from the State Engineer's files and there is no evidence to show that the same was even filed therein. We obtained a print copy of this map or detail sheet from the company's office on the 26th instant from which it is evident that the plan of development contemplated the use of this basin as a part of the main canal without any improvement or work thereon.

A plat designated as "Table of Elements" was approved by the State Engineer and the State Board of Land Commissioners, February 13, 1911, and filed in the office of the State Engineer, March 3rd, 1911. This table shows the length, dimensions, capacities, etc., of the main canal and laterals and lists the check basin under the heading "Main Canal" and indicates that the same extends from Station 0 to 32, a distance of 3,200 feet, but gives no other data concerning it.

The general map and table of contents herein above referred to are the only approved plans on file in the State Engineer's office, covering this basin.

Inspection of Works—Engineer's Reports.

To insure the construction of the works in accordance with the plans and in conformity with the contract, the State Engineer kept inspectors on the work during its progress.

These inspectors submitted written reports to the State En-
90 gineer from time to time concerning the progress, character and condition of the works, but none of these reports contain any references to the check basin except [illegible] written after the project was virtually completed and the water turned into the main canal. This, however, is not strange since the plans contemplated the use of this basin in its natural state and thus no work was performed thereon.

The following are quotations from various Engineers' reports on file in the office of the State Engineer concerning the check basin:

"* * * Work on the canals has stopped, leaving the system as a whole more than 99 per cent finished. * * *"

C. A. File 370.016: By R. S. Cookingham, C. A. Inspector. December 31, 1910.

"* * * We are not yet able to determine the factor of loss in the equalizing basin between the lower end of tunnel No. 2 and the headgate of the main canal and canal A. * * *"

C. A. File 370,029: By R. S. Cookingham, C. A. Inspector. June 14, 1911.

"* * * I notice in connection with the check basin that there are indications of crevises under the earth layer which showed action similar to that on the bottom of the Jerome reservoir last fall. This would indicate that there was a possibility of some loss during the time that the water stands in the basin. * * *"

C. A. File 370,041: By C. C. Carhart, C. A. Inspector. April 11, 1912.

"* * * The basin just below tunnel No. 2, has in the past developed some very serious leaks, but in my opinion, before the project is turned over to the settlers, these leaks will be stopped. * * *"

C. A File A. .026: By A. E. Robinson, State Engineer. February 27, 1913.

91 "* * * Leaving aside the question of water supply, the Salmon River works are such that the designing engineers can well be proud of and no fault can be found with the project from the standpoint of construction. * * *"

C. A. File 370.23: By A. E. Robinson, State Engineer. October 7, 1911.

"* * * Mr. Hyde in discussing the condition of the system with representative settlers found that there did not appear to be much contention as to the completion of the system, except with reference to the question of the losses occurring in what is known as the check basin between Station 0 and Station 50. * * * Obviously it is as much to the interest of the company to reduce losses to a minimum as to the settlers and Mr. A. J. Wiley, consulting engineer, has within the past few days advised the company to build a two bank canal from the end of the tunnel at Station 0 to connect with the thorough cut which begins at Station 32 and extends to Station 66. This canal to be located upon the west side of the check basin with its bottom in a cut of ½ foot, depth of water to be 8½ feet, bottom width of canal to be 32 feet, banks to have top width of 8 feet, and 2 feet free board, inside slopes 2 to 1, outside slopes 1½ to 1, capacity to be 1,000 sec. ft. Mr. Wiley estimated that this canal which would do away with the losses in the check basin could be constructed for about $11,000.00. * * *"

C. A. File 370.41: By Hoyde, C. A. *Engining* State Engineer. December 30th, 1914.

"* * * Did not examine the check basin or the open cut from the check basin to the beginning of "A" lateral but it is contemplated by the company to lower and widen the rock cut from the check basin to the beginning of A lateral for the purpose of
92 lowering the water in the check basin. There is a break in the bottom of the check basin which is surounded by a dirt

mistake was called to its attention by a petition for a rehearing accompanied by a transcript embodying the omitted pleading, that it should grant a rehearing before recalling its first decision and deciding the appeal on the merits, the term not having elapsed and a full hearing having been had at the beginning. P. 89.

2. The laws of Idaho concerning irrigation projects under the Act of Congress known as the Carey Act (c. 301, § 4, 28 Stat. 422,) provide that assessments for maintenance and operation, where the operating company has not come under the control of the settlers, shall receive the approval of the State Land Board before payment is exacted from the settlers, making it a condition to such approval that the Board be satisfied that the proposed expenditures for which the assessment is made are necessary for the maintenance and operation of the irrigation works and are proper charges against the settlers. *Held*, that an act of the Board, purporting to approve an assessment tentatively as for maintenance, leaving for future determination the question whether the work in view was indeed for maintenance, or construction work for which settlers could not be assessed, and providing that, in the latter event, the Board would require that amounts collected be credited on settlers' contracts for water rights or be repaid them in cash by the company—was in effect no approval, and that settlers were entitled to repayments of amounts collected under it by the company. P. 90.
3. As the Idaho law does not vest the State Land Board with power to adjudicate rights to repayment of moneys thus wrongfully collected, their adjudication in the courts is not an encroachment on the province of the Board. P. 92.
4. Concurrent findings of two lower courts that work for which an irrigation assessment was made was construction work and not for maintenance, *held* sustained by sufficient evidence. *Id.*

272 Fed. 356, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court requiring the appellant company above named to repay to settlers on an irrigation project moneys collected from them by assessments to defray the cost of certain work thereon.

Mr. Oliver O. Haga, with whom *Mr. McKeen F. Morrow* and *Mr. J. L. Eberle* were on the briefs, for appellants.

Mr. James R. Bothwell for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This appeal presents a controversy over an assessment for operation and maintenance of the Salmon River irrigation project in the State of Idaho.

In 1914 eight settlers under the project, for themselves and all others similarly situated, brought a suit in equity in the United States District Court to obtain a comprehensive adjudication of various disputes which had arisen respecting the relative rights and obligations of the parties interested in the project,—the court's jurisdiction being invoked because of the involution of the construction and application of the Carey Act, c. 301, § 4, 28 Stat. 422, and its amendments. The principal defendant was the company which had contracted with the State to construct the irrigation works and to sell necessary water rights to settlers; and another was the company which was to operate and maintain the works when completed, but which was as yet under the control of the construction company. The early proceedings in the suit are reported in 225 Fed. 584, and 242 Fed. 177.

In 1919, while that suit was still pending, the two companies—one still under the control of the other—made and sought to collect from the settlers an assessment of fifty cents per acre to defray the cost of work about to be done on a section of the irrigation works called the check basin. The assessment was made as part of an annual maintenance charge which the settlers were to bear; but they refused to pay because they regarded the work as construction work the cost of which was to be borne by the construction company. The companies threatened to shut off the water if payment was not made; and one of the plaintiffs in the equity suit, for himself and all other settlers, brought an action in a court of the State

to have the assessment annulled and to enforce delivery of the water.

During a subsequent hearing in the equity suit the defendants therein, who were also defendants in the action brought in the state court, presented to the District Court a petition setting forth the institution of that action, alleging there was such relation between the two proceedings that their prosecution in distinct tribunals would embarrass the parties and lead to possible conflicts of authority, and praying for an injunction against the prosecution of the proceeding in the state court. An informal but extended discussion followed, in which counsel on both sides recognized the propriety of drawing the whole matter into the District Court. Counsel for the plaintiffs took the position that, if the injunction was granted, there should be some provision assuring prompt repayment to the settlers if the assessment was collected and their objection to it afterwards was sustained by the court. Counsel for the defendants assented to this and indicated that the defendants or some of them stood ready to give a bond of that character. Accordingly the court, with full acquiescence of the parties, entered an interlocutory order (a) enjoining the prosecution of the action in the state court, (b) requiring the construction company within a limited time to execute a bond to repay within thirty days all moneys collected on the assessment if the court determined it was a construction charge to be borne by that company rather than a maintenance charge to be collected from the settlers, and, (c) enjoining the collection of the assessment if the bond so required was not given. The bond was given and the settlers paid the assessment. Subsequently, after a due hearing, the court rendered a decree determining that the work was construction work the cost of which was to be borne by the construction company, and requiring that company to repay to the settlers within thirty days the amounts collected from them.

The defendants appealed to the Circuit Court of Appeals, which at first reversed the decree, but later in the same term, on finding that it had proceeded on a mistaken understanding of the circumstances in which the District Court came to adjudicate the controversy, changed the reversal into a decree of affirmance. 272 Fed. 356. The appeal to this court is from that decree.

1. The defendants complain that the Circuit Court of Appeals in changing its decision acted on an application for rehearing and evidence submitted therewith without granting a rehearing.

It is true that the change in decision was prompted by an application for rehearing, but not that any evidence was submitted with the application. What the defendants refer to as evidence was not such, but was a supplemental transcript containing their petition for an injunction against the prosecution in the state court of the action relating to the assessment. The petition had not been included in the original transcript sent to the Circuit Court of Appeals; and that court, finding no pleading relating to the controversy over the assessment, held that the District Court had no occasion to adjudicate the controversy, and accordingly reversed its decree. When that decision was announced the plaintiffs obtained the supplemental transcript and, under a prior stipulation permitting omissions in the record to be supplied, filed it in the Circuit Court of Appeals with an application for rehearing. The court then recalled its first decision and substituted another dealing with the merits of the controversy and affirming the decree. The second decision was given at the same term as the first, and therefore while the matter was still within the court's control. An examination of the two transcripts shows that the supplemental one served only to bring sharply to the court's attention what already appeared in the original—that the controversy was laid before the District Court in circum-

stances which made it admissible and appropriate for the court to proceed to its adjudication. Among other things, the original transcript set forth at length the discussion had when the defendants presented the petition for an injunction, and also contained the interlocutory order made at the time and the bond given under that order. The discussion, as set forth, disclosed the substance and purpose of the petition, the nature of the controversy over the assessment and a tacit consent of the parties that the matter be dealt with on the lines followed in the interlocutory order and bond. The ultimate decree recited that it was rendered after a hearing had under the order and bond. In short, the original transcript showed such a submission of the controversy that the absence from the record of the petition for an injunction was not material.

In our opinion it was quite admissible in the circumstances for the Circuit Court of Appeals to change its first decision and correct the mistake therein by disposing of the merits without granting a rehearing. The parties had been fully heard in the beginning.

2. The defendants further complain that in adjudging that the moneys collected on the assessment should be repaid to the settlers the court failed to give proper effect to what the State Land Board had done in the matter and encroached on the board's province.

By the laws of the State the board is invested with authority to supervise the fulfilment of contracts for the construction of irrigation works under the Carey Act and to accept the work when completed. But there was no acceptance in this instance. One of the state laws, c. 14, Sess. Laws 1917, requires that assessments for the operation and maintenance of such works, where the operating company has not come under the control of the settlers, which was the case here, shall be submitted to and receive the approval of the board before payment is exacted. This assessment was submitted to the board, and the

settlers objected that it was not for operation or maintenance but for construction. A hearing resulted in the adoption by the board of a resolution declaring that it was not then prepared to pass definitely on the matter and would secure further data during the approaching irrigation season on which to rest a definite conclusion, but that it would temporarily approve the assessment as one for maintenance in order that the money might be collected and the work proceed, and if it ultimately concluded that the work was construction work it would require the amounts collected to be applied as credits on the settlers' contracts for water rights or to be repaid in cash. This was not satisfactory to the settlers, so the matter was taken into court as before shown.

It is not necessary to consider what effect should be given to an unqualified approval by the board, for there was none here. In effect what the board did was to say: "We cannot determine from the data before us whether the work, to pay for which the assessment is made, is construction work which the construction company is bound to do, or is maintenance the cost of which is to be collected from the settlers, so we reserve that question for future investigation and determination; but to tide the matter over we now give the assessment a merely tentative approval, and if we ultimately determine that the work is construction work we shall see that the settlers receive credit on their water-right contracts for the amounts collected or that they are repaid." The state law makes it a condition to giving an approval that the board be "satisfied" that the proposed expenditures "are necessary for the operation and maintenance" of the irrigation works and "are proper charges against" the settlers. This prerequisite was plainly wanting, as is affirmatively shown by the board's resolution, and therefore the tentative approval, only formally given, was in contravention of the statute and of no effect. The law also makes the board's approval a condition to the right to collect an assessment;

and of course where the board does not approve it can give no authority to collect. As the collection was made without the prescribed approval, and therefore without right, the settlers were entitled to repayment. The state law does not purport, nor has it been construed, to vest the board with power to adjudicate rights to repayment of moneys thus wrongfully collected; so their adjudication in the courts is not an encroachment on the province of the board.

3. It is also complained that the findings of fact on which the decree rests are not in accord with the evidence. Of this it suffices to say that the courts below concurred in the findings and we think there was sufficient evidence to sustain them.

Decree affirmed.